(E.D. Pa. 2001) (The Apprendi rules "are not the type of watershed rules implicating fundamental fairness that necessitate retroactive application on collateral review."); Garrott v. United States, 238 F.3d 903, 906 (7th Cir, 2001) ("[N]o appellate court has held" Apprendi retroactive). For the above reasons, Petitioner's Apprendi argument cannot be deemed a substantial claim.

B. Petitioner's Due Process Rights Were Not Violated by the Proof Standard Imposed by the Court

Petitioner claims that this Court should have used a higher standard than the preponderance standard that was used in deciding the loss and obstruction. This Court will not consider this claim because Petitioner made this same argument on direct appeal. A §2255 petitioner may not relitigate issues that were previously litigated at trial or on direct appeal. United States v. Palumbo, 608 F.2d 529, 533 (3d Cir. 1979). The Palumbo petitioner had two full and fair hearings in federal tribunals (district court and court of appeals), where he argued the same issues that he was attempting to argue on his §2255 claim. The Palumbo Court found that "[t]o permit relitigation here of the issues previously decided by this Court ... would not further the purpose of §2255 and would result in wasteful duplication of the federal judicial review process." Palumbo, 608 F.2d at 533. Here, Petitioner has had two full and fair hearings, one before this Court and one before the Court of Appeals where the preponderance standard was found to he sufficient.

Assuming Petitioner's claim survived the procedural obstacles, it would fail on the merits. The Third Circuit has held that "disputed sentencing factors need only be proved by a preponderance of the evidence. United States v. Dass, 2002 WL 549103, *2 (3d Cir. 2002) (quoting United States v. Evans, 155 F.3d 245, 253 (3d Cir. 1998)); United States v. Kikumura, 918 F.2d 1084, 1098-102 (3d Cir. 1990). When

the court evaluates loss according to the Sentencing Guidelines, "the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information." U.S. Sentencing Guidelines Manual §2F1.l, cmt. n.8 (1997). After considering testimony of expert witnesses for both the defense and the government, this Court was convinced by a preponderance of the evidence that the amount of the loss to the county of Essex was $5,000,000. This finding was proper and affirmed by the Third Circuit.

Similarly, a preponderance of the evidence was the sufficient standard for finding that the Petitioner obstructed justice by perjuring himself before the SEC, and enhancing the sentence by two levels. The Sentencing Guidelines provides for an enhancement of 2 levels if a defendant willfully obstructed the administration of justice. United States v. Boone, 279 F.3d 163, 180 (3d Cir. 2002); U.S. Sentencing Guidelines Manual §3C1.1 (1987). The government must prove by a preponderance of the evidence that the defendant obstructed the administration of justice. U.S. v. Helbling, 209 F.3d 226, 250 (3d Cit. 2000). In this case, the government was able to convince this Court, by a preponderance of the evidence, that the Petitioner lied in his sworn testimony before the SEC. The inconsistency was based on the fact that the jury found that the Petitioner was receiving kickbacks, but while under oath the Petitioner alleged he was being paid this money for doing work. This Court, consequently increased Petitioner's sentence 2-levels pursuant t U.S.S.G. §3C1.1. This finding was also proper and affirmed by the Third Circuit.

C. Petitioners Counsel Was Not Ineffective

Under the Strickland test, in order to prove ineffective assistance of counsel:

> First the defendant must show' that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). "Only after both prongs of the analysis have been met will the petitioner have asserted a successful ineffective assistance of counsel claim. Moreover, 'judicial scrutiny of an attorney's competence is highly deferential" United States v. Hart, 2002 WL 3183374. "4 (E.D. Pa. 2002), (quoting Diggs v. Owens, 833 F.2d 439, 444-45 (3d. Cir. 1987)); "An attorney is presumed to possess skill and knowledge in sufficient degree to preserve the reliability of the adversarial process and afford his client the benefit of a fair trial." Id.; see also Strickland, 466 U.S. at 690 ("[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement.")

To prove prejudice, Petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." Strickland, 466 U.S. at 694. Petitioner alleges he was deprived of effective assistance of counsel because of his counsel's failure to investigate and challenge the opinion of the government's expert witness as to the amount of loss; failure to present effectively evidence prepared by the defense expert that no loss occurred; and failure to challenge at sentencing other items of loss attributed to Petitioner by the government.

This Court finds that Petitioner has not demonstrated ineffective assistance of counsel. During the sentencing hearing Petitioner's counsel challenged the government's position on loss and made an effort to convince this Court to adopt the defendant's witness' calculation. The only evidence Petitioner offers to prove that but for the errors of his counsel, the outcome would have been different, is the opinion of a new expert witness as to the amount of loss. Simply replacing the opinion of his former expert witness with that of a new expert is not sufficient to illustrate that counsel was ineffective, especially since the Petitioner selected the former expert. (Sentencing Tr. at 10). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." StrickLand, 466 U.S. at 688; McAleese v. Mazurkiewicz, 1 F.3d 159,170 (3d Cir. 1993), and Petitioner's argument based on this new expert's opinion is not enough to overcome the "strong presumption that counsels conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689.

CONCLUSION

For the forgoing reasons, Petitioner's request for relief pursuant to 28 U.S.C. §2255 is denied. Because Petitioner has not made a reasonable showing of a constitutional violation, no certificate of appealability shall issue.

signature
William H. Walls, U.S.D.J.

26 June 2002
Dated

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPH P GALLUZZL
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ORDER
Civ. No. 00-5952 (WHW)
Crim. No. 96-640

Walls, District Judge

Petitioner Joseph Galluzzi moves for a writ of habeas corpus. For the reasons given in this opinion,

It is on this 26th day of June 2002:

ORDERED that the petitioner's request for a writ of habeas corpus pursuant to 28 U.S.C. §2255 is denied.

signature
William H. Walls, U.S.D.J.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

02-3267

JOSEPH GALLUZZI,
Appellant
v
UNITED STATES OF AMERICA

PRESENT: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH
Circuit Judges

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

BY THE COURT

signature

Circuit Judge

DATED: September 26, 2003

CLC\CC:JPG, GSL, GJM

UNITED STATES COURT OF APEALS
FOR THE THIRD CIRCUIT

JOSEPH P. GALLUZZI	)
Appellant,	)
v.	) Docket No. 02-3267
UNITED STATES OF AMERICA	)
Respondent.	)

Application For A Certificate Of Appealability

Joseph P. Galluzzi, Pro Se
No. 20596-050-Unit 2
Post Office Box 2000
Lewisburg, PA 17837

November 1, 2002

Date

The Appellant, Joseph P Galluzzi, does hereby make Application for Certificate of Appealability from the "Opinion" and "Order" of Denial of Appellant's initial and first §2255 Motion for a Writ of Habeas Corpus, of District Court Judge William H. Walls dated June 26, 2002, and June 28, 2002 respectively. Exhibit A. A detailed procedural history is set-forth in the "Statement of Facts" in the accompanying "Memorandum of Law In Support of this Application".

The Opinion of the District Court is a classic failure to address the pivotal substantial denial of the 5th and 6th Amendment Constitutional guarantee of Appellant. The substantial prejudice, to Appellant, caused by this denial of Constitutional rights is crystal clear as herein after set forth. The District Court refused to consider the granting of a "Certificate of Appealability". As will be demonstrated, any further attempt to have that Court reconsider or fairly address the issues that were present before it is fatal.

The erroneous failure of this lower Court can be basically viewed in three categories:

(1) Total ignoring and attempt to avoid addressing the recent June 24, 2002 mandate of the United States Supreme Court in the case of Ring v. Arizona, No 01-488, and its per se application to the case at bar.

(2) Absolute blindness to the multiple and accumulative ineffective counsel Sixth Amendment violations and attempt to divert the focus by an erroneous conclusion that this substantial claim was based upon an attempt to substitute a new expert's report (see Op of Ct. p. 8) Ext "A"

(3) Total cloaking of prosecutorial misconduct, including the concealing of critical favorable defense evidence.

Finally, this Application urges the granting of the Certificate based upon newly discovered evidence not previously available to appellant by the gross ineffectiveness of counsel and prosecutorial misconduct.

More specifically, the District Court's Opinion" and "Order" on its' face fatally violates Appellant's constitutional rights.

Summary of Opinion

1. Standard of Review – Page 3, Op of Ct.

The Court acknowledges, here that "a §2255 motion is to he granted --- if the sentence resulted in a fundamental defect, which inherently results in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure" Kikumara, 987 F.Supp. at 574.

The Court, however, fails to address the recent Supreme Court decision of June 24, 2002 in Ring v Arizona, No. 01-488 (6/24/02), which supports and addresses the unconstitutional impact on appellant's jury trial rights, the miscarriage of justice and constitutional rights infringement, where the critical factual sentencing aggravating finding of pecuniary loss if removed from the jury and a judge alone substitutes respecting the same.

2. Analysis Pages 3&4 Exh "A"

A. Unconstitutional Sentencing Enhancement

The Court, in its' opinion, fails to recognize the elimination of "indeterminate sentencing" as a result of the "Sentencing Reform Act", implemented with the "Federal Sentencing Guidelines", which are statutory and have the "effect of law" Instead, the Court erroneously cites United States v. Cepero, 224 F.3d 858, 868 (3d Cir 2000) and miscites United States v. Williams, 235 F.3d 858, 868 (3d Cir 2000), despite its inapplicability as stated in Appellant's Memorandum and Reply to Government Response. Notably the Court fails to cite the significant Third Circuit cases that are the forerunner of Ring: United States v. Spinner, 180 F.3d 514 (3d Cir. 1999); United States v. Mack, 229 F.3d 226 (3d Cir 2000): United States v. Pressler, 256 F.3d 144 (3d Cir 2000); Knight v. United States, 266 F.3d. 203 (3d Cir, 2001); and United States v. Vasquez, 2 F.3d 93 (3d Cir. 2001). See Point I(A) of Memorandum of Law and Chart — "Third Circuit Forerunner to Ring v. Arizona". Exhibit B.

Page 5 The Court has failed to recognize the Amendment to Title 28 U.S Code Annotated, Chapter 153 - Habeas Corpus, dated April 24, 1996, that makes "retroactivity" a non—issue when on an initial §2255 motion.

Further, the Court failed to recognize that Ring is retroactive per se. See Point I(B) of Memorandum re: Ring v. Arizona Applies Retroactively to Appellant. The Court in their Opinion, cites and relies on cases that are not applicable to appellant's case.

Page 6 "B" Violation of Due Process

Here, the Court first, miscites, United States v. Evans, 155 F.3d 245, 453 (3d. Cir. 1998), by taking out of context one statement in the case, but fails to reflect the outcome of the matter which is in contradiction to the court s reference.

Secondly, the Court fails to address the total impact of Ring v. Arizona. See Point I(A) & (B) of "Memorandum of Law.

Page 6 Op Ct. The Court erroneously uses a defective umbrella stating that Appellant's arguments regarding "Loss" and "Obstruction of Justice" were previously litigated stating "a §2255 Petition cannot re-litigate issues that were previously litigated ……", disregards and dismisses the fact that a §2255 Petition is purposefully the vehicle and venue to challenge a sentence based on Constitutional issues of jury v. judge fact finding.

Page 7 Op. Ct. C. Ineffective Trial and Appellate Counsel

The Court fails to address the specific critical issues of ineffective counsel that were raised in Petitioners Memorandum of Law filed with Petitioner's §2255 motion (see pages 18-22) Exhibit C. Instead, the District Court created a false issue; ie. substitution of expert report. Not so!

The Court also failed to address the claim, on pages 25 and 26 (of Memorandum) that the reasons, and reliance, by the Court, on the critical document referred to as CH-9" was incorrect. The text of the relevant pages clearly establish that the substandard performance of trial defense counsel, in not bringing to the attention, of the Court, misleading, inaccurate and inconsistent information and testimony, which would have definitely impacted favorably on Appellant's sentence was negligent. In addition, the test also clearly establishes the prejudice against Appellant's expert, and the failure of defense counsel to point out the many errors See Point II A through C.

Had the Court granted an evidentiary hearing, the Petitioner's claims would have been overwhelming supported and documented.

Most significant is defense counsel' s clear ineffectiveness when he agreed (stipulated) as to the use, by Petitioner, of "numbers" that appear in CH-9. See Page 26, Memorandum (Exhibit C-1). This stipulation, without Petitioner's consent, and the Court's failure to ensure that Petitioner understood the impact and consequences of the stipulation is unconstitutional. The Court in its Opinion failed to address or respond to these clear factual instances of counsel's ineffectiveness. It attempts to cloud, avoid and erroneously dismisses these claims by stating; "the only evidence Petitioner offers .... is the opinion of a new expert witness s to the amount of loss". Totally wrong!

Had the requested hearing been granted, Petitioner would have had the opportunity to further document counsel's ineffectiveness regarding "Obstruction of Justice" enhancements. See Point II Memorandum of Law.

Based on the foregoing facts, it appears that the sentence imposed was based on "legal and factual error", thereby violating Appellant's guarantee to due process and a jury trial with effective counsel under the 5th and 6th Amendment of the United States Constitution.

Therefore, it is respectfully requested that a Certificate of Appealability be granted in order to restore Appellant's constitutional rights and remedy the very substantial prejudice which occurred.

Further, the District Court in its failure to respond to the government's claim that the 1989 Bond Refunding issue was not a sound economic strategy, and Appellant's response to this claim, has in effect decided [the Court] that the

economic merit of this bond issue is a non-issue. The Court, however, enhanced Appellant's sentence based on a non-existent economic loss.

The Court has also failed to respond to Appellant's statements that this type of "Bond deal" (refunding) with its costs [not loss] was used again by Essex County in 1995. That 1995 Bond issue, also, did not achieve a present value savings, as the government claims that it must. (see Reply Memorandum, Exhibit C-2, p. 4 (Discovery previously denied)).

In addition, the Court failed to respond to, or give recognition to, the other examples, brought forth by Appellant of this type of "Bond Refunding" that were sold for the Cities of Trenton and Atlantic City (see pgs. 4,5,6 Reply Memo., Exhibit C-2). All of these bond issues ("bond deals") had costs relating to their sale, and all disclosed that there was not a present value savings from the transaction.

No one recharacterized these costs as losses, as was done by the government in regard to the 1989 Bond refunding deal; no less were they charged in a criminal activity. Ironically, on the two refunding issues, Trenton and Atlantic City; both were represented by the same individuals who had input on the Essex County 1989 $104 million bond issue.

(a) Clifford Goldman (Trenton) was the financial advisor to the Local Finance Board at the time the 1989 Bond issue was considered. Clifford Goldman's failure to respond to a subpoena served to appear at Appellant's sentencing hearing was critical to Appellant

(b) John Frohling (Atlantic City), an attorney, served as an advisor to the Board of Chosen Freeholders in regards to the 1989 Essex County Bond refunding.

No one has been indicted on these Bond deals.

The Court, has failed to recognized, as put forth in the §2255 Motion; that the sentencing enhancement based on loss was further in error, as supported by trial testimony. see pages 9 and 10 Reply Memo., Exhibit C-1 which clearly raises the factual question as to whether the County of Essex suffered any loss at all. Trial Defense Counsel failed to advise the District Court regarding testimony concerning the alleged spread adjustments, and the "losses" resulting - . p.10 Reply memo. Exhibit C-2. The Court failed in not responding to these claims, that cannot be refuted, and. thereby failed as the sentencing court, to correct this eggregious error.

Appellant asserts that this is not re-litigation. This is the revealing of documented facts that clearly support a sentence reduction.

The Court also fails to respond to two significant Third Circuit, due process cases, i.e., United States v. Mannino, 215 F.3d 835, 845 (3rd Cir. 2000), p.g. 10. Reply Memo. and United States v. Nappi, 243 F.3d 758, 763-64 (3rd Cir. 2001) p. 10 and 11 (Reply Memo. C-2).

The significant critical issues raised by the Appellant in his §2255 Motion, and the Court's failure to address them would have been fully considered and decided, if an evidentiary hearing, as requested, had been conducted by the Court.

This Court, in the particular matter finds itself in a unique position in having the Hon. William H. Walls conducting the proceedings below. Judge Walls had approximately eleven (11) years of experience in Municipal government with the City of Newark, N.J.

Other than sitting as a Municipal Judge from 1968-1970, the balance of his municipal government experience was as an Assistant Corporation Counsel, Corporation Counsel and then Business Administrator for the City of Newark. In these capacities, it is certain that he dealt with municipal financing documents and the N.J. Bond Law.

It is therefore shocking to Appellant, that Judge Walls remained silent, when the government's expert witness Mack Egland proposed alternatives to the 1989 $104 million Bond refunding; that were all illegal in the State of New Jersey.

Surprisingly by also is his Honor's failure to respond or take into consideration, defense counsel's response to the P.S.R. detailing, by statute, Mr. Egland's incorrect assumptions and his lack of understanding of N.J. Bond law.

Although defense counsel was negligent and ineffective, by not presenting this to the Court, i.e., this clear error of the government's expert, and his obvious confusion and misunderstanding of this particular bond issue, the Court (Judge Walls) remained silent and therefore failed to consider. facts that clearly refute his reliance of any report prepared by the governments expert.

Defense counsel failed to ask for a ruling of law on these issues presented by the government, and Judge Walls, because of his unique experience in municipal government, should have interrupted the proceedings, at trial, to issue a Memorandum of Law regarding the legality, in the State of N.J., of the alternatives presented in Mark Egland's testimony.

This critical failure, among the others set forth above, clearly prejudiced the Appellant at trial and most certainly at sentencing. Since the 5th and 6th Amendment rights of

Appellant have been clearly shown to have been violated a Certificate of Appealability should be granted.

Respectfully submitted,

signature*

Date

Joseph P. Galluzzi, Pro Se
No. 20596-050-Unit 2
Post Office Box 2000
Lewisburg, PA 17837

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOSEPH P. GALLUZII	)	
	)	
	)	
Petitioner,	)	
	)	
	)	
v.	)	No. 02-3267
	)	Civ. 00-5952 (WHW)
	)	Crim.No.96—64O
UNITED STATE OF AMERICA	)	
	)	
	)	
	)	
Respondent.	)	

APPELLANT'S MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR A CERTIFICATE OF APPEALABILITY

Joseph P. Galluzzi
Per Se Appellant
20596-050, Unit 2
Post Office Box 2000
Lewisburg, PA 17837

November 1, 2002
Date

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Preliminary Statement

This memorandum is submitted by Appellant, Joseph P. Galluzzi, acting pro se, in support of his application for a Certificate of Appealability and Appeal of the decision of the District Court of New Jersey, (Hon. W.H. alls), in denying Appellant's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2255, opinion dated June 26, 2002, filed June 27, 2002, Order dated June 28, 2002.

Appellant requests the Court to accept his motion to appeal the District Court's decision based on reasons set forth in the application and in this memorandum, that clearly and specifically demonstrate the very substantial violations of Appellant's constitutional rights.

Statement of Facts

By Superseding Indictment No. 96-640, Appellant was accused of fourteen counts of mail fraud (18 U.S.C. §§1341, 1346) two counts of wire fraud (18 U.S.C. §§1343, 1346), five counts of bribery (18 U.S.C. §666), and five counts of using a facility in interstate commerce to commit bribery (18 U.S.C. §1952)

The charges were premised on the theory that Appellant abused certain financial positions he held with Essex County by taking alleged bribes or kickbacks in exchange for referring bond and financing projects to various entities. On April 24, 1998, the jury found Appellant guilty of all 26 counts (PSR ¶2). The jury did not find nor were they asked to find aggravating elements/factors of pecuniary loss or obstruction of justice.

A sentencing hearing was conducted before a judge to determine an appropriate amount of alleged loss. After that

hearing, the sentencing court, alone, concluded that a preponderance of the evidence showed that the loss exceeded $5 million, warranting an increase of 14 levels to the offense level. The loss was based on non-jury findings and were allegations that Essex County lost millions of dollars as a result of a debt re-structuring plan, not alleged in the indictment.

The Court also held that a 2-level increase for the obstruction of justice was warranted, based on testimony before the Securities and Exchange Commission. Ultimately, the offense level was aggravated to be 28 and the corresponding guideline range 78-97 months. Accordingly, on September 10, 1998, the Court sentenced Appellant to concurrent terms of 90 months imprisonment on several of the counts, and lesser concurrent terms on other counts, as well as restitution in the amount of $350,000. A judgment was entered accordingly on September 18, 1998.

On appeal to the United States Court of Appeals for the Third Circuit, petitioner raised various issues, including that: the evidence of guilt was legally insufficient; the district court erroneously admitted certain evidence; the prosecutor's conduct in connection with a civil proceeding was improper; the court should have applied a heightened burden of proof when evaluating the amount of loss; and that the court's findings regarding loss and obstruction of justice were not supported by the record. The conviction and sentence were affirmed in an unreported decision on May 28, 1999, and a petition for a writ of certiorari was denied on December 6, 1999 (528 U.S. 1048 [1999]).

A petition for a writ of habeas corpus was filed pursuant to 28 U.S.C. §2255 on December 6, 2000. This petition has been denied pursuant to district court's opinion dated June 26, 2002, ordered June 28, 2002.

Subsequent to the appeals Court's determination, and as a result of discovery, previously denied, additional information and documents have been uncovered by appellant that have a significant impact on the decision and proceedings of the District Court. The new discovery and its impact is addressed extensively in this memorandum.

LEGAL ARGUMENTS

Point I Ring v. Arizona, applicable in this case, requires that the alleged loss and obstruction of justice facts, which drastically aggravated the sentencing range level above the crime of conviction, be found by a jury and not the judge alone.

Overview of Issue

The Honorable William H. Walls totally fails to address the recent United States Supreme Court decision of June 24, 2002, in Ring v. Arizona, No. 01-488 (6/24/02). That case mandated that the portion of the statutory scheme under which this District Court enhanced Appellant's level of crime of conviction, to a higher level, based on an aggravating uncharged and unfound crime, outside the jury verdict, was unconstitutional. It violates Petitioner's guarantee of a jury trial. Had the District Court addressed the Ring declaration, its Opinion and Order would have necessitated that the §2255 Petition be granted. The Court solely addressed and misapplied Apprendi v. New Jersey, See Exhibit A, Dist. Ct. Op. pages 3 to 5.

The Court then proceeded to compound its wrong by holding erroneously that Apprendi v. New Jersey, id., as it relates to this case did not apply retroactively even though this case was not a successive §2255 petition. The Court cited only inapplicable successive §2255 cases in support of its position. Exhibit A, pgs. 5-6. It then maximized its fatal

destiny by failing to recognize that the controlling case of Ring v. Arizona, applied retroactively to this Appellant's motion.

Upon this defective foundation, the district court then held that "Appellant's sentence was not unconstitutionally enhanced". (Exhibit A, p. 5-5). The district court even acknowledged that the enhanced Appellant's sentences "were on the basis of loss and obstruction of justice, where the jury was not asked to decide on these issues". Exhibit A, p. 4.

Failing to address Ring's contrary holding regarding the limit of the district court's sentencing authority and range, Judge Walls erroneously held:" Apprendi is not applicable to Appellant's situation because the penalty imposed, on Appellant, was within the statutory range". id. at p. 4. Not only was the Court in error on its basic Apprendi premise, it failed to consider Ring's contrary holding, and also failed to even respect the Third Circuit cases on the subject. See Exhibit B, Chart – "Third Circuit - The Forerunner to Ring."

A. Substantive Principles of Ring

1. Ring applies to non-capital and capital cases: Jury not Judges choice.

1. Ring v. Arizona, requires that a jury, not a judge, to find the existence of pecuniary or other facts upon which a defendant's sentence is enhanced to an aggravated sentencing range. The District Court's omission of Ring v. Arizona, cannot be attributed to any perception of non-application of that case to the Appellant's case. The United States Supreme Court clearly and expressly stated to the contrary.

> "What today's decision says is that the jury must find the existence of the fact that an

aggravating factor existed". Ring v. Arizona, No. 01-488, June 24, 2002, (Scalia, J. concurring at page 4).

"Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment". We see no reason to differentiate capital crimes from all others in this regard". Ring, id. at p. 2 and 21, Op. of the Court, Ginsburg, J.

"The right to a trial by jury, guaranteed by the Sixth Amendment, would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death". "We hold the Sixth Amendment Applied to both". Ring, id. at 23 - Ginsburg, J. Op. of the Court.

2. Ring Parallels The Alleged Pecuniary Loss Enhancement In This Case.

The United States Supreme Court, on June 24, 2002, reversed a death penalty sentence based on a pecuniary gain aggravating factor. The Court stated that the Sixth Amendment guarantee of the right to a jury trial had been violated, because the judge and not the **jury** made the factual findings required for the imposition of the increased sentence, beyond the scope of the jury verdict. That portion of the statutory scheme, that permitted the violation was struck as unconstitutional.

The Court made it clear that there is no difference in the Sixth Amendment sentence violations when a jury

convicts a "white collar" defendant, as here, of charges that did not include a pecuniary loss. A sentencing judge is constitutionally constrained by the jury's crime of conviction verdict where no pecuniary loss are found. The jury verdict provides the maximum range for the punishment to be inflicted under the mandatory federal sentencing law (i.e. Federal Sentencing Guidelines). Here, the jury finding had no pecuniary specification. A loss level was not a charge for the jury to consider, therefore the verdict must be considered to be without any such finding. The judge cannot change that verdict.

In Appellant's case, the statutory maximum varied among the charges. The final sentence, however, was enhanced, as in the Ring case, based on certain aggravating factors such as pecuniary gain or loss that was found by a judge conducting the sentencing hearing alone.

Mandatory sentencing ranges, under the Federal Sentencing Guidelines, as adopted by Congress, are limited to those authorized by a jury verdict. The Supreme Court found unconstitutional the Arizona sentencing scheme that allowed a judge to impose a greater penalty, than that dictated by the jury verdict, based on aggravating factors of pecuniary gain, presented at said sentencing hearing, conducted by the judge alone. So too was the finding of the sentence of the sentencing judge in Appellant's case.

3. Series of High Court Cases Culminating In Ring's Solid Revival Of The Right To Trial By Jury In This Case.

Ring v. Arizona, was the critical decision in that implemented, that which was the goal, of the United States Supreme Court two years prior in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000)---"it is unconstitutional" to remove from the jury the assessment of facts that alter the

Congressionally prescribed range of penalies to which a criminal defendant is exposed. (1).

The holding in Apprendi is.that:

> "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." id. 120 S.Ct. at 2362-63. (2)

Over the past two years, Circuit Courts have rendered a diversity of opinions on the subject of the scope of the Apprendi mandate. The High Court has now clarified and implemented its decision in the Jones and Apprendi cases. Any conflicts in the Circuits have now been resolved and reconciled in Ring v. Arizona, See also recent - State v. Benenati, Ariz. Ct. App. No. 2, CA—CR, 1999-0066 (9/3/02). [Ring hold that Apprendi applies even when sentence imposed is less than unechanced maximum]. Exh. D

Ring v. Arizona leaves no question unanswered:

The Sixth Amendment right to a jury trial and determination, requires a jury (not a judge) finding, regarding aggravating factors of a pecuniary nature, that results in an increased penalty. So too, this Appellant has the same guarantee as Ring.

The Court's decision resolved any ambiguity anyone might still perceive regarding the issues of what is the role of statutory maximum, in relation to the Federal Sentencing Guideline law and also the debate in regard to elements verses factors. The United States Supreme Court unequivocally put to rest the misguided technique of minimizing its Apprendi decision that suggested that the

formalistic statutory maximum language of Pre-Sentencing Reform Act Statutes exclude the application of Apprendi.

The Supreme Court of the United States' decision in Ring clearly states that the guarantee of a jury trial "applies even when the sentence imposed is less than the formalistic statutory maximum". It is the "effect" that a finding of fact has on a sentence, not the form of the finding. id.

4. STATUTORY MAXIMUM ROLE

Ring v. Arizona, recognizes it is "meaningless" jurisprudence that results from the formalistic approach to the convenient use of statutory maximum as an exception to Constitutional jury protection. Arizona argued, as the federal government does here, against Appellant, the formal maximum, in the Statue dictates over the prerequisite that proceed it, i.e., a factual pecuniary fiding.

> "The Arizona first degree murder stature authroizes a maximum penalty of death, only in a formal sense", Apprendi, 530 U.S. at 544 (O'Conner, J. dissenting), for it explicitly cross-references that statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty ... If Arizona prevailed on its opening statement, Apprendi would be reduced to a meaningless and formalistic rule of statutory drafting". See 530 U.S. at 591 (O'Conner, J. dissenting Ring Id. at p.__).

The rule is one of "effect" not one of statutory maximum "form". The ultimate test is not statutory maximum.

> "The dispositive question, we said, is one not of form, bit effect: Id at 494, citing Apprendi. If a State makes an increase in a defendant's authorized punishment, contingent on the finding of a fact, that fact-no matter how the State labels it-must be found by a jury beyond a reasonable doubt". See id. at 482-483. "A defendant may not be exposed... to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone". id at 483 also id. at 499 Scalia, J. concurring). All facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury: Ring Id. at p. 16, Op. of the Court, Ginsburg, J.

Severity of punishment is a "process" related to separate aggravating fact-finding in some cases. Ring id. Op. of Court pg 14, Ginsburg, J. Thus, under Ring, it is the maximum sentence provided by law solely on the basis of the factors found by the jury that is controlling. The form of the statutory language is immaterial. The Third Circuit had previously predicted and decided this prior to Ring. See previous Third Circuit cases of Mack, Pressler, Knight and Vasquez in Exhibit B. For example, if as in Appellant's case, that sentencing level is a 10, then that is the maximum Sentencing Guideline level that can be imposed. The jury did not, nor was it asked to specifically find a pecuniary loss aggravating factor to enhance the penalty. The statutory indeterminate maximum sentence is formal but without effect. It requires a pre-requisite factual fact-finding. The same does not apply in the case ranges that, fix determinate statutory minimum terms. The Court in Harris, reconciled:

> "As we shall explain, McMillan and Apprendi are consistent because there is a fundamental distinction between factual findings, that were at issue in both cases. Apprendi said that any fact extending the defendant's sentence, beyond the maximum authorized by the jury verdict would have been considered an element of an aggravated crime-thus the domain of the jury-by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding". Harris v. United States, No. 00-10666, June 24, 2002, opinion of Kennedy, J. at p. 9 (emphasis added).

The bottom line in the case at bar, is that the statutory maximum "authorized by the jury verdict" is a level 10. The District Court here was totally out of step when deciding: "Apprendi, is not applicable to Appellant's situation because the penalty imposed on Appellant was within the statutory range." The statutory range per the P.S.R., as promulgated by the Federal Sentencing Guidelines, was a level 10, plus 2 points for multiple events - totalling 12 points. The Guideline range has the "force and effect of law" - see Mistretta v. United States, 488 U.S. 361 (1989) at 413, Scalia, J. dissenting. Also see Guidelines are "law" in Miller v. Florida, 482, U.S. 423 (1987) and United States v. R.L.C., 503 U.S. 29 (1992), that Guidelines are "statues".

Determinate Sentences were established as a result of the U.S. Sentencing Reform Act and the implementing U.S. Sentencing Guidelines. The flexibility of the Court is constrained by the criminal classification, the bundling of offenses, and the Ranges as established by the conviction of

the elements of the crime. The statutory maximum previously applied during the period of indiscriminate sentencing procedures have been superseded by the Sentencing Guidelines, which are in fact a statute and have the force and effect of law.

The District Court here does not recognize that the discretion once allowed has been lost after the adoption of the Guidelines. Level 12, as per Guidelines, is a 10-16 month sentnece. This is a for cry from the 90 months to which the Court aggravated the "maximum authorized by the jury verdict". Note, the District Court, recognized that Guidelines had to be followed, but used the wrong factors and range that was contrary for the crime of conviction as found by, the jury.

The United State Supreme Court in Ring, in emphasizing the importance and the conscience of the Sixth Amendment has revived its spirit of jurisprudence and enforcement. The High Court, in its final word, "says is that the jury must find the existence of the fact that an aggravating factor existed." That is conclusive in Appellant's case. The District Court has infringed very substantially, on Appellant's Constitutional right of trial by jury.

The Federal Sentencing Guidelines that were given birth under the Federal Sentencing Reform Act supersedes the old indeterminate statutory maximum system. These Guidelines, with its determinate ranges, and fixed by Congress, are mandatory law. Any facts that have the "effect" of increasing a defendant's term of imprisonment beyond the "outer limits" fixed by a jury verdict and mandated by the Federal Sentencing Guidelines cannot be found by a judge at a post-trial sentencing hearing. As in the case of pecuniary factors which fix ranges of prescribed sentences, the Sixth Amendment requires that such factors be submitted to and decided by a jury... "Whether the statute

calls them elements of the offense, sentencing factors or Mary Jane - must be found by a jury beyond a reasonable doubt". Ring, id. Scalia, J.

In the case at bar, it was unconstitutional to strip the jury of that finding.

The back to tradition and history approach used by Justice Thomas in Apprendi, is relevant here. Utilizing the petit larceny/ grand larceny example of separate crimes, the aggravating element factors, as a pecuniary element is clear. It is rooted in long history, and is again the test. Effect not form is the Ring message. "Pecuniary" facts must be submitted and decided by the jury.

FOOTNOTES

1) Apprendi endorsing Jones, 120 S.Ct. at 2363 (quoting Jones, at 526 U.S. at 252-253); also see the historical condemning of the stripping of grand and petit juries power of fixing the "aggravating" penalty parameters of a crime, e.g. United States v. Gaudin, 515 U.S. 506 (1995) c.f. In re: Winshp, 397 U.S. 358 (1970).

2) The issue is beyond mere statutory interpretation as in Castillo v. United States, 530 U.S. 120 (2000) and Carter v. United States, 530 U.S. 225 (2000).

B. Unconstitutional Enhancement For Obstruction of Justice.

Appellant was further unconsitutionally enhanced two levels by the Court because of his testimony before the SEC in July of 1995. The facts here, also, were not changed or found by a jury. The sentencing transcript of September 10, 1998 (Exh. N, pgs 71 (18-21), pg 72 (22—28), Pg 73 (1—8), (15-19) states the Court's reasoning for the enhancement. In

addition to a two level increase in his sentence, the Court erroneously added to the economic loss factor, monies relating to Appellant's association with A.G. Edwards.

Testimony before the SEC, given by the two primary A.G. Edwards Vice Presidents, was completely contracdict the Court's findings. See Exh 0 and 0-1. Timothy McDounough (Exh 0 pgs 38, 39 and 40) when asked several times directly and indirectly, whether Appellant asked for was paid a finder's fee or any monies in connection with the 1990 E.C.I.A. bond issue, state (Mc Donough) clearly "NO" nine times (9) and "absolutely not" once.

Testimony of Mr. David Brownstein, on Decembe 07, 1995 (Exh 0-1) when asked a similar series of questions on page 119, 120 and 121, regarding the payment of a finder's fee to Appellant, answered in the negattive 6 times. Mr. Brownstein was a government witness at Appellant's trial and did not once state that Appellant was paid directly or indirectly a fee, in any form for the 1990 E.C.I.A. bond issue. Mr. Brownstein testified at trial that payments to Appellant were consultant fees no matter how they may have been described in any billing.

The testimony (SEG) of these two A.G. Edwards Vice Presidents clearly contradict the government's and the Court's conclusion that Appellant received kickbacks from the 1990 E.C.I.A. bond issue.

This testimony, regarding these alleged kickbacks was completely ignored by the Court. Defense counsel failed to remind the Court, or present this testimony at sentencing, to argue, first, that the enhancement for "obstruction of Justice", and the related dollars the court applied to the enhancement of a monetary loss.

This issue should, under the Fifth and Sixth Amendment Rights, have been charged in the indictment, and presented to a jury for findings. This would have resulted in a determination that would have required a higher standard of proof before a jury, which more than likely would not have supported an aggravated factor to increase Appellant's sentence. Alternatively, if the Court had granted an evidentiary hearing regarding Appellant's §2255 motion, ineffective counsel, is also more than likely that a downward sentencing adjustment would have been granted.

1. The SEC and the government also questioned Mc Donough and Brownstein, as to how A.G. Edwards was chosen lead underwriter for the 1990 E.C.I.A. bond issue. Both answered that it was through the County Executive, Nick Amato and Tom Banker, the Executive Director of the E.C.I.A. This is in complete contradiction to the government's and subsequently the Court's erroneous determination that Appellant "steered this deal to A.G. Edwards."

2. The SEC and the government also questioned Mc Donough and Brownstein as to how Robert Brown, an attorney, became involved in the E.C.I.A. deal. Both answered that Mr. Brown's involvement in the bond issue came as a recommendation from the County Executive Nick Amato. SEC testimony given by Robert Brown also confirmed that he became part of the bond issue through his friend, Nick Amato. Mr. Brown was paid a fee of $20,000, which was unconstitutionally added to the loss calculation on monetary loss.

Defense counsel again failed to urged the Court of this strong testimony in contradiction to the assumptions made to increase Appellant's sentence.

C. Ring v. Arizona Applies Retroactive To This Appellant's Initial §2255 Motion, In That It Invalidates A Statutory Scheme That Has The Effect Of Divesting A Jury From Deciding The Aggravating Factors Of A crime In Violation Of The 6th Amendment.

The District Court's opinion places its ultimate argument "assuming Apprendi were applicable", (not addressing the stranger Ring case), "it should not be applied because it established a "new rule" of constitutional law which may not be applied retroactively." citing Teague v. Lane, Op. Ct. Pg. 5. EXH "A"

The District Court on this point scored a two-fold error.

1. The real issue is not Apprendi's retroactivity but the per se retroactive application of Ring v. Arizona. When the Supreme Court, deems a statute or a portion thereof as fatally unconstitutional, its decision is retroactive per se. The statute was, is and remains void, yesterday, today and tomorrow.

2. The Court failed to recognize that Teague has been preempted in so far as the facts of this case is concerned. Teague was decided in 1989. Seven years later, (1996) Congress modified the Teague doctrine. In so far as the case at bar is concerned, the non-retroactivity bar to raising a new constitutional rule does not apply to an initial §2255 motion. It applies only to "a second or successive motion". See 28 U.S.C.A. §2255, Anti-Terrorism and Effective Death Penalty Act (ATEDPA).

Appellant's §2255 motion is not a "second or successive motion". Interestingly any case that was cited In the District Court's decision and in the prosecutorial brief

was either a second or successive motion, or was pre-1996, ie, prior to the controlling statue. (ATEDP).

For example, the District Court, at pg. 5, Exhibit A cited a series of pre-1996 Anti-Terrorism and Effective Death Penalty Act (ATEDP) cases, ie, Graham v. Collins, 566 U.S. 46 (1993), Peney v. Lynaugh, 492 U.S. 302 (1989), which does not address the 1996 amendments that do not require a finding of retroactivity in the case of an initial §2255 motion/petition. The government induced the District Court's confusion by citing similar not applicable cases. However, the greater confusion was caused by the government in its answer/response citing at p. 25-26 -- a Litney of second or successive motion cases, like Jones v. Smith, 231 F.3d 1227, 1236 (9th Cir. 2000); Levan v. United States, 128 F.Supp. ___, 270 (E.D. Pa. 2001). Clearly not applicable to an initial §2255 motion. The district court, in turn, at p. 5 of its "opinion" robotically cites Levan v. United States in support of its erroneously based position. Levan clearly is a "successive" motion.

The district court, again on page 5 of the opinion, Exhibit A, cites O'Dell v. Netherland, 521 U.S. 151, 157, 117 S.Ct. 1969, 1973 (1997), quotes both Penry v. Lynaugh and Teague. However, neither case is applicable to appellant's case. They are cases which are superseded by the 1996 Act or involve procedural rather than statutory constitutionality. not a "second or successive" motion. The 1996 Congressional Act (ATEDP) only relinquishes retroactivity finding in cases of second or successive §2255 motions.

(A) Retroactive Application of Ring v. Arizona

The retroactive application of a United States Supreme Court mandate striking a legislative sentencing scheme, which is in violation of a fundamental constitutional guarantee, is the essence

of preventing it from being "senselessly diminished." Ring, id at 23, (Ginsburg, J.), Op. of the Court.

Retroactive application of this constitutional guarantee and its future protection provides the restoration which is the linch-pin of Ring v. Arizona. Without retroactive application "our people's traditional belief in the right to a jury trial by jury" would be placed on continuances "perilous decline". Ring, id. Scalia, J. at p. 3.

The absurdity of a contrary position is demonstrated by the "effect" and "impact" test of Ring, not a formalistic legalism. Reflect on a death-row candidate's life being saved or extinguished based upon whether his sentence was before or after June 24, 2002. Absurd! Ring's mandate must be both redemptive as well as restorative. It redeemed those who were previously under an unconstitutional law. It would be "senselessly diminished" if it did not deliver all equally from this infraction. All under Ring are to receive the promise of the founders of the constitution of a guaranteed jury trial.

B. Separation of Powers and Retroactive Application of Voiding Portions of Statue.

It is a fundamental cornerstone of the Untied States Constitution that the United States Supreme Court is granted the judicial power to declare statutory schemes as being in violation of the Constitution. Where the High Court so acts in striking such a statutory scheme there is no issue of retroactive application. This is distinguished from a ruling that merely addresses a technical procedural defect. Granted, quite a division occurred in the lower courts over whether the declaration of Apprendi *v.* New Jersey was substantive or procedural. In the narrow context of the 6th Amendment striking of a statutory scheme, either facially or as applied, the issue is different. That statutory regime is either Constitutional (yesterday, today and tomorrow) or it isn't.

The date of the declaration of validating or invalidating is immaterial to the application of the Supreme Court decree.

The Ring declaration puts to an end the cavorting with issues of statutory maximum and elements vs. sentencing factors. Respecting the 6th Amendment aspect of the Apprendi ruling, Ring brought to a demise any debate regarding retrospective unconstitutionality in the narrow context of invalidation of sentencing regimes.

In its effort to end the diminishing of the right to trial by jury, Ring selected a demonstrative example. It was in the context, as in this case, of the role of a jury in finding pecuniary facts as opposed to a judge alone.

Ring was a case in which the judge's role, authorized by the statutory regime, resulted in a finding of pecuniary gain which increased the jury verdict of life to death. In doing so, the High Court in Ring, repeatedly stated that its' ruling extends to non-capital as well as capital cases. In the case at bar, the statutory scheme, likewise, authorized a judge to make pecuniary findings to drastically increase the sentence.

The 6th Amendment deems any statutory structure, which permits a judge rather than a jury to find this pecuniary aggravating fact, unconstitutional. This type of foundational unconstitutionality is unlike many Apprendi cases argued in the lower courts. Ring runs right to the legislative law that permitted 6th Amendment violations. It is the difference between procedural and foundational constitutionality. It is the difference between peripheral and core constitutionality.

The United States Supreme Court, within four days of rendering its historic Ring mandate, of revival of the 6th Amendment, made it undisputably clear that there is no room for avoiding it by a retroactivity argument. Retroactivity is a non-issue not applicable to Ring's ring of protection to

defendants. Four cases (three from Arizona and one, from the Eighth Circuit) were decided before the court's summer break. There is to be no attempt to minimize this decree with retroactivity.

The Ring mandate was applied retroactively in all four cases. All involved the collateral attack of the sentence at issue. Although some were on direct appeal, among the issues present was the collateral issue of sentence validity.

In Harrod v. Arizona, 2002 WL 13935 (U.S.), the High Court acted on a collateral attack of an aggravated sentence. Leaving no doubt it declared: "The judgment is vacated and the case is remanded to the Supreme Court of Arizona for further consideration in light of Ring v. Arizona, 536 U.S. ___ (2002)". The issue in Harrod, as in Ring and in the case at bar, is one where a judge alone has enhanced a sentence beyond the facts determined by a jury was:

> "Is the law under which the penalty was enhanced by the judge's findings" unconstitutional on its' face and/or as applied in this case?" Arizona v. Harrod, 352 Ariz. 11, 26 P.3d 492 (2001); see also accord, Sansing v. Arizona, No. 1-7837 and Pendell v. Arizona, 2002 WL 1393 603, both United States Supreme Court June 28, 2002.

In Allen v. United States, a federal court judgement was retroactively vacated in light of Ring. Here, the provisions of the Federal Death Penalty Act (FDPA) were the focus. The issue was the allowing of a prosecutor to propose non-statutory aggravating facts to a jury. It was upheld as constitutional by the 8th Circuit. United States v. Allen, 247 F.3d 741 (8th Cir. 2000), Particularly relevant to the retroactivity issue was that it was based on the 8th Amendment and Article 1 of the Untied States Constitution. An 8th Amendment violation was argued. The Circuit Court

rejected "Allen's" facial challenge to the FDPA. The United States Supreme Court, however, viewed the portion of the FDPA unconstitutional in light of Ring. Allen's sentence was vacated and remanded in view of Ring. The federal courts continue to respect retroactivity of Ring. See United States v. Fell, D.Vt., No. 2:01-Cr-12-01, 9/24/02.

C. Ring and Third Circuit Recognition of Facial and Implemental Unconstitutional Portions of Federal Sentencing Scheme at Issue Here.

The substantive aspects of increasing and enhancing imprisonment sentences are a function of the statutory Federal Guidelines, but are implemented through the Courts. The entirety of the Sentencing Reform Act of 1984 is not at issue. However, the recent United States Supreme Court decisions of Jones, Apprendi and now Ring; seriously call into focus the constitutionality of the certain narrow aspects that appear to vest in the Court the sole right to increase, in substantive increments, prison terms, e.g., U.S.S.G. Chpts. 2 and 3. That right is on occasion, as in the case at bar, beyond that specified in the indictment and the jury verdict.

For sometime, before Ring, constitutionally minded lower court jurists have expressed concern. See United States v. Frank, 682 F.Supp. 815 (W.D. Pa. 1988.)(holding the "sentencing guidelines procedure applicable here (did) not adequately protect the due process right of defendant to present evidence and to challenge the basis of his sentence before a court which has authority to weigh the evidence and determine the appropriate sentence). id. at 819. Also see United States v. Davis, 715 F.Supp. 1473 (C.D. Cal. 1989)(declaring the guideline procedures to be unconstitutional).

Unfortunately, many Circuit Courts, early on, turned a deaf ear, e.g., the Ninth Circuit immediately reversed the

Davis' declaration. United States v. Davis, 950 F.2d 820, 829 (9th Cir. 1990), cert. denied, 113 S.Ct. 210-211. It was Jones v. United States, that commenced a redemptive and restoration process. Next the Supreme Court decided Apprendi. If Jones and Apprendi left room for arguments on the issue of retroactivity, the day of reconciliation came on June 24, 2002 in Ring v. Arizona. To avoid any issue regarding retroactivity the major opinion, and concurring opinions, adopted the facial/implemented unconstitutionality of the legislative structure that bred the dilemma. Retroactive per se.

In the Third Circuit, Chief Judge Becker, from the outset of the Apprendi decision, through its progeny has been consistent. He cautioned that these violations had to be viewed through the constitutional "lens" of the United States Supreme Court. As the unconstitutionality in certain cases became evident he (Judge Becker), pointed it out and ultimately he suggested that the legislative branch review the Constitutional dilemma of a sentence exceeding the "crime of conviction". A detailed study of the relevant Third Circuit cases compliments the foresight of this Circuit. See "Third Circuit - The Forerunner to Ring". Exhibit B.

This "chart" places in juxtaposition the Third Circuit case of Mack, Pressler, Knight and Vasquez to the declaration of the United States Supreme Court. The exactness, consistency and conclusions of this Third Circuit are indeed prophetic to the fulfillment in Ring.

POINT II: **The Pattern Of Ineffective Counsel Failures And Substandard Conduct Individually And Accumalatively, So Prejudiced The Appellant To Result In A Violation of the 6th.Amendment Right To Effective Counsel.**

OVERVIEW OF ISSUE

The law and facts as it relates to the severe pattern of failures and substandard conduct resulting in a Sixth Amendment violation is set for in Appellant's §2255 Motion (Exh. C—1 & C-2)

The District Court did not address one, no less the cumulative impact of prejudice incurred. Instead Judge Walls chose to do an "end run", attempting to convert a supporting report, verifying the initial defense expert report and addressing to total incompetence, the government report relied upon by the Court in sentencing. It is clear from the Memoradum of Law and expert report, put before the District Court that it was not at all a defense attempt to substitute one expert for another. Had the court read the report and Memorandum, it is crystal clear that both defense experts are in one accord, based on factual financial bond closing documents and transcript testimony.

A. Defense Counsel Ignores The Fact That The 1989 Bond Refinancing Issue Had A Stated Cost Not A Loss.

Definitions:

Cost - Price paid to acquire or accomplish something (Anticipated)

Loss - The act of losing not as a result **of** accident or misfortune failure to maintain. (Not Anticipated)

History:

Testimony at Board of Chosen Freeholder (BOCF) meetings and at the Local Finance Board (LFB) meeting were ignored.

It was made very clear during the presentation before the BOCF and the LFB, by Appellant and the government's co-operating witness (Tuttle), that the proposed $104 million debt restructuring bond issue was being proposed for two basic reasons:

1. To ease cash flow problems that the County was esperiencing.

2. Reduce the Tax Levy over the first four years. This intermediate measure would give the County an opportunity to re-structure their financial needs and source of funds to satisfy those needs. See BOCF 4/12/89 (Exh E) and LFB 4/19/89 pgs. 14, 16, 19, 43 and LFB 4/19/89 pgs. 12, 13, 18, 29. Exh F

Also stated at these hearing, very clearly was:

1. That there was a Cost to this debt refunding transaction.

2. That this transaction was not and could not be an interest rate savings refunding, and therefore, no Present Value (PV) savings.

See BOCF minutes 4/12/89, pgs. 14, 16, 19, 43 (Exh E)

Tuttle in a bank "Memorandum" dated 3/7/89 (Exh G) is both forthright and honest in presenting the fianncial impact of the proposed financing. He clearly states a net cost

over the life of the program. On April 19, 1989, at the BOCE meeting, almost 1½ months later, Appellant emphasizes the cost factor impacting this transaction.

There was nothing regarding the Refunding Bond issue that was misrepresented, or misleading at any time, before any Board. There was Full Disclosure regarding the impact of this transaction.

Defense Counsel never referred to these minutes or disclosures, either at trial and specifically not in answering the PSR or at the sentencing hearings.

Bond Counsel, John Scally, of McCarter & English, on May 31, 1989, testitied before the BOCF, that the $104 million Refunding issue had a cost (not a loss)element (Exh I) pg. 21) Mr. Scally, again on September .26, 1989, in a Memorandum that he prepared in reponse to Freeholder Lustbader's concern, re-stated that there was a cost factor in doing this transaction. (Exh. J). In contrast to the Court's interpetation, at trial, to the jury, regarding the role of Bond Counsel, ie: "does not deal with the economic merits of the issue…..", the BOCF, Appellant the Administration and the LFB, had every right to rely on the clear testimony and written opinion of a very respected bond counsel and prestigious law firm of McCarter & English. Defense Counsel failed to effectively press the right to a complete cross examination of Mr. Scally.

Report Of Analysis Group Economics Inc., Prepared 12/3/97:

This report was co-authored by Mark Egland, the government's expert witness.

(Exh. K) Under "A" Opinion Summary pg 1 expressly states (2d ¶) "The refunding plan will cost the

County approximately $5.8 million on a net present value basis as of 1989.

Cost not Loss

* This report was given to defense counsel in December 1997.

* This report, supportive of Appellant's statements of cost, was never presented at Trial.

* Defense Counsel failed to argue this contradicting evidence in the prosecutors case, to the Court, at trial and at sentencing, the jury and to the Probation Office. Defense was unprepared and ineffective.

Under "B" Reasons and Basis, for Opinion

Pg. 8 (Second ¶) "On November 21, 1989 (5 plus months after bond sale) Mr. Galluzzi provided the County Executive with a"Close Out" report that contained similar base case alterntive charts" (Exh. L)

* Attachment #7 becomes government Exhibit CH-9, which Egland ultimately uses in his certificate in Report submitted 9/5/98 (undated) See (Exh. L-2 (CH-9) Documentation that expert did not prepare or orginate schedule used in certification.

Same Paragraph "Both the Base Case and Alternative three.... avoidance of borrowing at 8% clearly show that the County increased its costs (not loss) by engaging in this refunding scheme.

* Everyone knew and was told, beginning in April 1989, that there was a cost factor. NOTHING NEW,

NOTHING HIDDEN, NO LOSS. Government's expert confirms Appellant's disclosures

Defense counsel totally failed to enlighten the jury or remind the Court, of any of these extensive disclosures of costs. He failed to distinguish costs from loss. See Appellant's Reply Brief. (Exh C-2).

* Costs, specifically when everyone is aware of them, are not a sentencing element or factor. Only losses are.

* Subsequently the government had Mark Egland prepare a "Certification", post trial, undated, in which he re-characterizes the same information, conviently as a loss (Exh. M).

* Mark Egland presents confused testimony at trial regarding the cost or loss of this bond transaction, as cited in Appellant's Reply Brief (Exh C-2).

* The Government again in "Response to Petitioner's §2255 motion", 4/23/01, pg. 11, mistates testimony and documented Exh. J-2 eveidence by replacing the word cost with loss. These words are not interchangeable. This mis-characterization appears to be a conscience attempt to mislead the Court and no a mere oversight.

Appellant objects to the Court's failing to address this significant misrepresentation. See (Exh. E) BOCF minutes 4/12/89, stating $14 million cost, memo from Tuttle (Exh. G) stating $15 million cost.

B. Defense Counsel's Stipulation Resulting In Prejudice Reliance On Government's Exhibit CH-9

At the sentencing hearing of September 10, 1998, defense counsel, without the consent of Appellant, made a monumental incompetent and substandard "Stipulation". A stipulation to the inaccurate government Exhibit CH-9. As a result, a totally non-existent loss was fabricated. Neither defense counsel nor the Court instructed Appellant as to the impact of this Stipulation.

Transcript Sentencing Hearing 9/10/98, Exhibit N. p 69 (5-12)

Page 69 - lines 5-12

Court: (to defense counsel D. Durbin) "He used these numbers did he not?"

Durkin: "He, in conjunction with others"

Court: "I'm not interested -- he used those numbers, that's what I mean advanced".

Durkin: "They are the numbers, that were used in the transaction". (Stipulation).

Court: "If he used them he will he bound by them ....."

Page 76 - lines 3-8

Court: "Because they are not Eglands figures. This is the defendant's figures which he advanced which he adopted and used to swing this deal in 1989. Those figures are

found in CH-9. And if the defendant relied upon them then, I shall rely upon them now.

Stipulation to Use of Exhibit CH-9

"when facts which tend to establish guilt are submitted on stipulation, the Court must determine whether the consequences of the admissions are understood by the defendant and whether he consented to them." Cox v. Hutto, 589 F.2d 394, 396 (8th Cir. 1979)(emphasis supplied).

"Lower courts have held that admissions and stipulations of guilt by counsel are the "functional equivalent of guilty pleas". Cox v. Hutto, 589 F.2d 394, 396-97 (8th Cir. 1979).

"Thus like guilty pleas, the Court is required to question the defendant to determine whether he knowingly and voluntarily agreed to the admission or stipulation. Without such an inquiry, there would be constitutional error that would be presumptively prejudiced. id. at 396", see also Adams v. Peterson, 968 F.2d 835, 843 (9th Cit. 1992)(Conviction Sentencing based on stipulation valid only if defendant voluntarily and knowingly agreed to admission or stipulation".

There is no doubt that from the sentencing hearing transcripts, that Appellant's attorney (Dennis Durkin) stipulated that appellant used the schedule known as Exhibit CH-9, in "selling this deal" ($104 million refunding) to the Board of Chosen Freeholders. (see sentencing transcript dated 9/10/98, pages 69, lines 5- 12, page 76, lines 3-8). Counsel stipulated to the court despite the fact that this schedule was not prepared until 5½ months after the Bond Refunding sale an some 7½ months after the proposal was

initially presented to the BOCF. (April 1989). See Memorandum of Law, pag 25).(EXH C-1)

Neither the Court nor appellant's attorney advised appellant of the sentencing consequences as a result of the reliance on Exhibit CH-9.

The error of the Court's reliance on Exhibit CH-9 and defense counsel's stipulation to that reliance by appellant, was presumptively prejudicial, unless the Court and/or the government can show, absent the reliance on and stipulation of the use of Exhibit CH-9, the government or court can show evidence/trial evidence, that would prove the calculated loss amount as presented by the government's expert Mark Egland.

Thus, if the only document that the government and the court used to establish the alleged significant loss was not in existence as the government and the court assumed it was, and then, that assumption was compounded when defense counsel erroneously stipulated that it was available to defendant, "to sell this deal", then that portion of defendant's enhanced sentence must be immediately cancelled or released from the sentence imposed.

Appellant never stipulated or was asked to stipulate to the alleged use of Exhibit CH-9 in "selling this deal" to the BOCF.

Appellant never pleaded guilty to crimes charged nor stipulated to any of the sentencing factors/elements presented to or used by the Court.

Appellant was never told of the draconian impact on his sentence as a result of everyone's reliance on Exhibit CH-9 and its alleged use by Appellant.

Defense counsel was ineffective in his defense of and argument against the enhanced sentence despite the documentation before him.

Defense counsel was ineffective in questioning government expert witness on his use and reliance of Exhibit CH-9 that was not available to appellant before the Bond Sale of June 1989, or was it part of the Bond transaction documents. Exhibit CH-9 is a schedule, prepared by the underwriter (Tuttle), that was part of a "Close out" report prepared by Appellant on November 21, 1989, and acknowledged as such by government's expert Mark Egland. See Exhibit H, Tr. trans 4/8/89, page 45, line 9, pg. 46, lines 8-15.

Defense counsel, at sentencing hearing and during cross examination never asked government's expert to produce his work papers that were subpoenaed. See Reply Brief, Direct Appeal, 4/13/99, page 4, Exhibit W. Defense counsel was ineffective in this regard inasmuch as these work papers were requested by Appellant's expert Felipe Ferrand, to verify calculations that government's expert allegedly made. Appellant's expert, because of this ineffective counsel, was not able to assist defense counsel in his cross-examination of government's expert. See Ferrand Affidavit, Exhibit X.

As a result of defense counsel's ineffectiveness and the obvious prejudicial treatment of appellant's expert, (who was not questioned on his report or his documented work papers), appellant had no alternative but to submit a report from another highly credentialed expert with his §2255 Petition, to emphasize the significant importance of the errors made by the Court and the government's expert.

Applicable Law

Attorneys' performance was unreasonable under prevailing professional standards and that this performance prejudiced the defense, i.e., "that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different". Government of the Virgin Islands v. Frederick, 865 F.2d 59 (3rd Cir. 1989)(citing Strickland v. Washington, 466 U.S. 688 (1984).

Applicable Law re: Sixth Amendment Violation:

Generally, in order to sustain a claim of ineffective assistance of counsel, the defendant [Appellant] must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 688, 687—96 (1984), United States v. Cronic, 466 U.S. 648, 658 (1984). But the Supreme Court has stated there are exceptions to that general rule:

> "There are, however, circumstances that are so likely to be prejudice to the accused that the cost of litigating their effect in a particular case is unjustified." Cronic, 466 U.S. at 658.
>
> "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of counsel altogether is legally presume to result in prejudice." Strickland, 466 U.S. at 692 (emphasis added).

Applicable Law re: Concessions and Stipulations by Counsel, amount to a waiver of constitutional rights of a defendant without the defendant's consent is:

"constitutional error of the first magnitude and no amount of. showing of want of prejudice would cure it." Brookhart v. James, 384 U.S. 1,3 (1966).

C. Defense Counsel Failure To Enforce Appearance Of. Subpeonaed Defense Witness Was Highly Prejudical To Defendant At Sentencing.

Clifford Goldman, a former State Treasurer for the State of New Jersey, was the financial consultant/advisor to the Local Finance Board (LFB) at the time that the 1989, $104 million Bond Refunding issue was proposed.

Defense subpeonaed Mr. Goldman, to appear at Appellant's hearing on September 8 and 10, 1998, and to testify as to his knowledge of, input to, the structure and merit of the bond issue in question.

Mr. Goldman and his input and comments to this refunding were referenced several times during the LFB hearing of April 19, 1989. (See LFB minutes, 4/19/89, pg. 12, lines 22-25; pg. 13, lines 2-8; pg. 18, lines 11-25, and pg. 29, lines 11-25). EXH F Mr. Goldman was also referenced at the Board of Chosen Freeholder (BOCF) meeting of April 26, 1989 (pg. 15, lines 2-25; pg. 19, lines 4-13). Exh E-2

SENTENCING HEARING, SEPTEMBER 8, 1998 TRANSCRIPT: (Exh N-2)

Pg. 3, lines 9-25.

Durkin (Defense Counsel)- ….."we have also subpoenaed Clifford Goldman who was financial consultant to the local finance board for the bond issue involved." Defense counsel states that he received a call form Richard Weinroth, attorney for goldman, who acknowledged

Goldman's receipt of the subpoena ----but that "Mr. Goldman did not understand the significane of the subpoena....." Mr. Weinroth further stated that Mr. Goldman was not available today because of an emergent periodontal surgery that day. Mr. Durkin advises the court that he instructed Mr. Weinroth to contact the court.

Pg. 4, line 4 Court "How essential is Goldman?"

Lines 5-10 Durkin "Judge, depending on what... .he is not the central point, but he has a role to play in regard to Mr. Egland's opinion in regard to A, the purpose of the bond issue and B, other alternatives available. Basically, he was the counterpart to Galuzzi, Judge. He was the financial consultant..... (LFB)"

Line 11 Court "I appreciate that". I understand that". Pg. 28 Lines 6-8 Durkin (in regards to Thursday hearing 9/10/98)

"Maybe we can check back wihin the hour. Maybe Mr. Weinroth has faxed the letter that he indicated he would send to the court".

Sentencing Hearing September 10, 1998: (.Exh N)

Pg. 2, lines 1-12 Defense counsel reminds the court that Clifford Goldman is under subpoena and that he has not appeared.

The court then makes a unilateral decision regarding the importance of Goldman's appearance and his testimony.

Court - Mr. Goldman's testimony would be appreciated but I don't think it's vital."

The Court's denial of insuring defense witness the opportunity to testify is clearly prejudcial and impacts on Appellant's due process rights.

Pg. 67, lines 5-21 - Defense counsel attempts to return to the matter of Clifford Goldman.

Durkin - "Mr. Lawrence advises me that he has been in contact through our office directly with Mr. Weinroth who represents Mr. Goldman, your honor." Mr. Goldman is not available today. Mr. Weinroth indicates he is available tomorrow. I don't know nessarily ....."

Court - "What would he. . . .how would he help us?"

Durkin - "Mr. Goldman acted as the financial advisor to the Local Finance Board in regard to the 1989 Series B transaction. And to that extent that there is a contention that the transaction itself had no economic benefit, it is clearly relevant for sentencing purposes to establish that the Local Finance Board and its financial consultant either did not say there is no economic benefit....or by the fact of approval (unanimous) stated that there is an economic benefit to the transactions."

* The court completely disregards defense counsel's statement regarding Goldman.

* Defense counsel fails to ask for a continuance.

* The court took no action on Appellant's behalf to institute whatever procedure was necessary to require Goldman to appear.

* Defense Counsel never makes this an issue again, at the sentencing hearing or in Appellant's Direct Appeal.

Becaue of the impact that the $104 million bond refunding issue had on his sentence, Appellant, starting in June 2000, through an invesigator, Richard Childs, attempted to obtain information from Clifford Goldman and the LFB that were missed or ignored by the government. Information that Appellant believed would help in his appeal of his sentence.

Appellant presents in Exhibit U , items 1, 2, 3, 4, 5, 6, 7 and 8, correspondence that is inconsistent to the facts and somewhat confusing. The dialogue varies from no recollection of the subpoena, or the transaction, or the existence of any workpapers, back to the acknowledgement of having received the subpoena. Mr. Childs re—confirms through correspondence the representations made. Most interesting is item #5, letter from Mr. Weinroth, 9/21/2000, indicating that Mr. Goldman was subsequently advised that his appearance would not be required. Item #6, letter from Mr. Childs to Weinroth, 11/27/2000, stating that it is critical to ascertain who advised Goldman not to appear. Mr. Childs never received a response to this letter.

Interestingly - as a result of a document filed in a related matter, **County of Essex v. First Union, Tuttle & Galluzzi,** copy of a report that Clifford Goldman did in fact prepare for the LFB on 4/6/89, specifically addressing the Essex County 1989, $104 million bond refunding porposal. Exh U Item 9

Appellant was denied due process to question Goldman on this transaction and his report.

The significance of this is (1) that Mr. Goldman described the transaction in his report of 4/6/89 for the benefit of the LFB, (2) The Local Finance Board unaimously approved this refunding application, (3) In 1995, the County of Essex did an identical refunding issue, with LFB approval

and as in the 1989 bond issue, did not reflect a Present Value savings (PV).Exh V. (4) During the year 2000, Mr. Goldman was the financial advisor to the City of Trenton in regard to a similar bond refunding issue, for basically the same reasons, and that issue also did not reflect a Present Value savings---- as the government, their expert and the court declared that it should. If Present Value savings was not achieved the government has classified these transactions as without economic merit and fraudulant, as they so characterized the 1989 bond issue.

The exhibits referenced in this issue are an important part of Appellant's claim. Evidence, discovery and testimony were denied Appellant that certainly had the possibility of reducing the draconian enhancement of his sentence.

POINT III: **THE U.S. ATTORNEY DENIED APPELANT HIS FIFTH AMENDMENT RIGHTS BY CAUSING APPELLANT TO BE DENIED RIGHTS TO DISCOVERY DURING PRE-TRIAL PERIOD, TRIAL AND POST TRIAL PERIODS AND THEREBY OBSTRUCTED JUSTICE. RECENTLY DISCOVERED MATERIAL WAS EVIDENCE PREVIOUSLY CONCEALED.**

A. Concealment of Evidence:

1. The U.S. Attorney's office was successful in halting Appellant's efforts for discovery and thereby controlling litigation by choosing what discovery can and cannot take place and what selected facts will be revealed.

2. Appellant's claim rests on the discovery of previously unavailable evidence and information regarding violation of Fifth Amendment privileges during Pre-Trial, Trial and Post-Trial periods.

3. On September 18, 1997, the U.S. Attorney's Office filed a motion in Superior Court of New Jersey, Law Division, Essex County, for an order permitting the United States to intervene and staying discovery in the matter of **County of Essex v. First Union Corp., et.al., Joseph Galluzzi and George Tuttle,** pending conclusion of the federal criminal case **U.S. v. Galluzzi** Crim, No. 96-640 (WHW). Exh P. This motion was granted.

4. Further, the U.S. District Court granted the U.S. Attorney's Office motion to intervene and stopped discovery in an SEC Civil Action until completion of Appellant's Criminal case. The motion was granted on December 8, 1997. See Exh Q. (Gov't Response 3/29/99, Direct Appeal, pgs. 57, 58, 59, 60.

5. Finally, after sentencing on November 17, 2000, by order of Administrative Law Judge, James T. Kelly, Appellant was granted discovery and inspection of SEC documents previously denied by intervention and subsequently by SEC Law Division refusal. Judge Kelly clearly stated that under the **Rules of Procedure,** the SEC's Division of Enforcement was required to make available to the Appellant SEC investigative files and material. Exh R. The SEC violated these Rules when Appellant requested access to SEC files, in 1998, post criminal trial was denied. As a result of this newly discovered evidence, previously concealed from Appellant, is now available.

6. Between January 29, 2001 and April 11, 2001, the U.S. Attorney's Office, Ralph J. Marra, AUSA, filed a certification opposing any additional release or inspection of SEC documents to Appellant Joseph P. Galluzzi. Exh. S—1 and S—2.

ANALYSIS AND IMPACT

Appellant's post conviction and sentencing discovery of SEC investigation files, granted in November 2000, through April 2001, produced documented evidence that contradicts government's misleading statements, in their Response Brief below, that clearly misleads the court and severely prejudiced Appellant's trial and sentencing. Exh Q (Appelle's Brief - Point VI - pgs. 57-60). As a result of this discovery and this proof of "prosecutorial misconduct", it is obvious that the U.S. Attorney's successful action in prohibiting Appellant discovery has cause "substantial prejudice to the rights" of Appellant.

B. Unconstitutional Investigative Device Of Simultaneous Unilateral Government Civil Discovery.

1. Appellant, in light of post—trial and sentencing discovery, again takes issue to the manner and extent that the U.S. Attorney's Office used the investigative powers of the SEC to support their effort for a criminal indictment and conviction.

2. This alliance, confluence, between the U.S. Attorney's Office and the SEC's Division of Enforcement and the manner in which it was orchestrated, **did** undermine and violate respondent's due process and Fifth Amendment privileges as warned in **SEC v. Dresser** 628 F2d. 1368-1381 (1980).

3. It appears that the U.S. Attorney, together w1th the SEC has acted with scienter and have been egregious in their actions to deny and prevent discovery of investigative documents to Appellant. This action has unquestionably denied Appellant due process.

4. The blatant uncoordinated, unprotected providing of documents by the SEC to the U.S. Attorney and compounded by the denial of discovery to the Appellant, to this same material is justifiably "Agency Bad Faith".

5. The U.S. Attorney, in their "Response: to Appellant's Brief, on direct appeal (see Exh Q. Pgs. 57, 58, 59 No. 1199 City **SEC v. Dresser** 628 F2d, 1368-1381 (1980) for justification to conduct parallel (not joint) investigations with the SEC. **Dresser** was used in its most narrow sense. A complete reading of **Dresser**, although establishing authority for government agencies to "conduct investigations regarding the same party, at the same time, that a criminal invesigation is underway", **Dresser** also trumpted a warning:

> id at 1374---"In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable"---the Sherman Act provides ---and the suits may be brought simultaneously or successively". "The order of their bringing must depend upon the Government: the dependence of their trials cannot be fixed by a fast rule or made imperatively to turn upon the character of the suit".

It is obvious, based on post trial and post sentencing discovery that documented U.S. Attorney's access requests now confirm that the SEC investigation was primarily to aid the government in their criminal investigation. It is clear that this was pre-meditated and prejudicial.

Continuing-——in **Dresser at** 1375-1376:

> "other than were there is specific evidence of "Agency Bad Faith" or malicious government tactics, the strongest case for deferring civil proceedings is where a party under indictment ---is required to defend a civil or administrative action involving the same matter". The non-criminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16 (b)---or otherwise prejudice the case" id 1376. Dresser also states at 1381---"there is no danger that Justice might broaden its discovery rights, because the subpoena power of the grand jury is as broad ---perhaps broader than that of the SEC". Justice can procure from Dresser (Appellant) directly whatever materials it might procure indirectly through the SEC." "In fact, a party investigated under SEC rules instead of grand jury procedures is accored far greater protection--"

Unfortunately, the U.S. Attorney's actions with the SEC cooperation, violated a very significant tenant of the cite....Justice **cannot,** whether through subpoena or by any other means, procure from defendant/appellant, his testimony for their criminal proceedings.

The U.S. Attorney sought and was provided transcripts of Appellant's deposed testimony before the SEC, which was not only referenced several times during appellant's trial and sentencing, but at one point the Court allowed the U.S. Attorney to read a portion of these transcripts into the record. This unholy alliance, between

government agencies resulted in violating Appellant's Fifth Amendment privileges at trial, contributing to the action that resulted in having Appellant testify indirectly despite Appellant's exercise of his Fifth Amendment privilege at trial.

Further to avoid Justice's right to criminal discovery, in concert with SEC:

> "the strict limitation on discovery in criminal cases, embodied in Federal Rules of Criminal Procedure 15-17, do not take effect until after a grand jury has returned an indictment." Id at 1381.

The U.S Attorney violated this rule. An indictment was returned on January .7, 1997, the SEC through Senior Attorney Teri A. Brotbaker, almost two months after the indictment on March 7, 1997, did in fact forward to the U.S. Attorney, a copy of Appellant's diposed privileged testimony given in June and July 1995. Exh. S.

This blatant act was a deliberate undermining of respondent's Fifth Amendment privileges and also concealing evidence from Appellant. For Appellant to challenge, at the time, the U.S. Attorney's insertion and interpretation of this indirect testimony, Appellant would have had to surrender his Fifth Amendment rights.

Contrary to the government's assertions under Point VI of their "Response" Exh Q, their reliance on **Dresser** to establish "unobjectionable" cooperation between them and the SEC only goes as far as their reference. When one reads **Dresser** in its entirety one finds numerous references warning of prejudical concerns and violations of a party's civil rights.

This action is an outright trashing of Appellant's rights.

6. The government, in their response Point VI, contradicts the documented facts, subsequently discovered that the "U.S. Attorney's Office and the SEC conducted parallel but completely separate grand jury investigations." The documented "privileged log" of SEC investigative file material, contradict this statement. Note numerous correspondence between the government and the SEC. Exh. T. The U.S. Attorney supplied the SEC search documents that were used by the SEC in questioning Appellant at the deposition hearings.

7. The U.S. Attorney acknowledges that they "moved to intervene and to stay discovery in the civil action pending the resolution of the criminal case. (SA 2419-2422). "By order of December 8, 1997, the District Court granted the U.S. Attorney's Office's motion to intervene" and the court ordered that discovery in the SEC civil action be stayed until completion of the instant criminal case against Galluzzi. Exh Q, pg. 58. The government then proceeds to deliberately mislead the court by stating "As the docket sheet of the SEC civil action reveals, no discovery was done by either party up until the time of the District Court's order staying discovery." (SA 2426-2428). It is obvious that this is not true. The 14 page privileged log is proof of the exchange of discovery items, up until and beyond the indictment and prior to December 8, 1997.

The Government continues with its misleading statements, stating "Moreover, the U.S. Attorney's Office did not need to use the SEC's civil discovery tools, given that it obtained all the information that it needed from its own separately conducted criminal grand jury investigation." The U.S. Attorney could not obtain Appellant's testimony directly.

SEC file discovery, "subsequently" granted to Appellant in November 2000, and conducted into 2001, produced documentary evidence that the statements made by th U.S. Attorney's Office, in their Response, Point VI are not true and have severely prejudiced Appellant's due process rights.

The U.S. Attorney's Office and the SEC have jointly acted in bad faith, in contravention with the Constitutional Rules of Procedure. This government action has not only obstructed Justice, it has violated Appellant's Fifth Amendment Rights guaranteed under the Constitution of the United States.

It was only since the post-trial/post-sentencing SEC November 17, 2000 Order, permitting a limited view of what had been previously concealed, that newly discovered evidence was revealed.

NEWLY DISCOVERED EVIDENCE
As A Result Of SEC Limited Discovery Granted November 20, 2000:

* Documented proof that the U.S. Attorney's Office in conjunction with the SEC, worked unilaterally to deny discovery to Appellant.

* That the U.S. Attorney's Office did in fact have access to SEC files in contradiction to their claim.

* That documented correspondence reveals the Inter-Agency bad faith to obtain information between the agencies to build their respective cases.

* The discovery of a document revealing that the County of Essex in 1995, conducted a Bond Refunding Sale similar to the 1989 Bond Refunding. That sale, as the one in

1989, did not achieve a Present Value Savings (Critical to Appellant, at trial, at sentencing and on Direct Appeal.) Government, in Appellant's case characterized this lack of Present Value Savings as fraudulant. The availability of this document would have impacted favorably against a 14 point enhancement from the Court.

Discovery regarding the County of Essex:

* Appellant's defense counsel had subpoenaed Clifford Goldman to appear and testify at Appellant's sentencing hearing regarding the Essex County 1989 Bond Refunding. Through the efforts of a Mr. Childs, on behalf of Appellant, it was discovered through correspondence that someone had informed Mr. Goldman that he did not have to appear in answer to a subpoena, at Appellant's .sentencing hearing. Exh U, Item 5.

* Again, through Richard Childs, Appellant discoverd that the Local Finance Board's file, regarding the Essex County 1989 Bond Refunding issue, could not be located. Exh. U, Item 8.

* On June 26, 2002, Appellant received a copy of a Report prepared by Clifford Goldman, on April 6, 1989, for the Local Finance Board, regarding the Essex County 1989 Bond Refunding Issue. Mr. Goldman, as related in correspondence stated he had no recollection of the bond issue, let alone a report. Exh. U, Item 9

Conclusion

On the basis of the foregoing, the Appellant respectfully requests that the decision of the district court be reversed, a certificate of appealability be granted and such other relief as shall be deemed appropriate.

Respectfully submitted,

November 1, 2002

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Joseph P. Galluzzi Appellant,	)))
v.	) No. 02-3267 Civ. 00-5952 (WHW)
United States of America Respondent.	) Crim. No. 96-640)

Appellant's Reply to Government's Opposition
to Request For Certificate of Appealability

December 26, 2002
Date

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Preliminary Statement

The "Objection" of the government to the Appellant's Application for a Certificate of Appealability is contrary to and a total affront to United States Supreme Court Justice George Sutherland's summation in Berger v. United States, 295 U.S. 78 (1934), stating:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The role of the government in a criminal case is not only to be the plaintiff but also to represent the defendant, by ensuring that he is treated fairly by respecting his due process rights.

This response primarily centers on the issues which the government's opposition did not dispute. With those issues undisputed, clearly the resulting "substantial showing of the denial of a constitutional right" 28 U.S.C. (c)(1)(B) not only requires the granting of the requested "Certificate of Appealability" but in the interest of justice and the Court's economy of time, a granting of the ultimate relief requested.

When Appellant's issues are not addressed, when key cases cited are not disputed and when the government apparently attempts to evade the violation of a substantial constitutional right; (such as the 6th Amendment guarantee to a jury), the government must expect that this Circuit Court is not unknowledgeable as the prosecution's fatal flight to eradicate the United States Supreme Court's constitutional mandates at issue here.

Point I Ring v. Arizona

The sine quo non of Points I A, B and C of the Appellant's Application and Memorandum of Law, is the June 24, 2002 mandate of the United States Supreme Court in the case of Ring v. Arizona, No. 01-483 (6/24/02). This Court will search diligently, and find that the case of Ring v. Arizona is not disputed (or even mentioned) by the government. This is not at all surprising since the commandment of Ring dictates immediate relief to this Appellant. There is no distinguishing Ring from the application to the facts of this case, nor is there any room for a prosecutorial "end run". It is Ring (inter alia) that this Appellant places before this Court. The government being without argument to dispute Point I _ A, B and C, misleads this Court. On page 1 of its "Opposition", it totally misrepresents the Appellant's position. The government intentionally substitutes its own alternative position on behalf of Appellant. This is not at all the position of this Appellant. The government falsely states, "Petitioner claims, inter alia, that his sentence should be vacated under Apprendi v. New Jersey". That is absolutely a bold face mirepresentation. It is totally untrue. The government's deception is placed before this Court for appropriate action. It is absolutely crystal clear that this Appellant, as the United, States Supreme Court in Ring, is not prey to any further government Apprendi cavorting. This Appellant stands with the High Court and

again states that his sentence must be vacated and reduced in light of Ring v. Arizona.

Ring and Apprendi are not synonymous. Ring is not merely an extension of Apprendi. Ring is not merely procedural as the government describes Apprendi. Ring is not, as the prosecutor describes Apprendi, mere "hypothesizing" by the United States Supreme Court. (see government "opposition", p-9). It is such mockery and disregard for the Supreme Court's 5th and 6th Amendment direction in Apprendi that caused that Court to halt, to further deceptive techniques to undermine 6th Amendment violations.

The Court in Ring unlike Apprendi, stated its intent to terminate jury guarantee peril:

> "over the last 12 years excelerating propensity ... to increase punishment beyond that authorized by the jury verdict ... cause me to believe that our peoples traditional belief in the right of trial by jury is in perilous decline. Accordingly, ..., whenever those factors (aggravating factors) exist they must be subject to the usual requirement of the common law, and to the requirement enhanced in our Constitution in criminal cases. They must be found by the jury beyond a reasonable doubt." Ring v. Arizona, Scalia, J., concurring.

It is for the Third Circuit to respect the High Court and not permit the prosecution to demean it as it has in its "Opposition". The government mocks by ignoring Ring totally, and ridiculing that which is enshrined in our Constitution by calling it "hypothesizing". (P-9, Gov't. Opposition).

As Chief Judge Becker has long warned, the United States Supreme Court's decisions are to be viewed through the "lens" of the Justices. Their mandate directed at protecting a constitutional guarantee, that are attempted to have them placed in "perilous decline" in the government's "Opposition". A total "extinction" is proposed.

Likewise the government utilizes the same misleading disrespect to this Court regarding Point I (B) Obstruction of Justice enhancement, Point II (the 6th Amendment violation of the right of effective counsel); and Point III (denial of 5th Amendment Right, by concealment of favorable evidence by the government). Newly discovered evidence confirms prosecutorial misconduct and documents untruthful statements made in the government's response. Here, the government totally fails to address these issues as if not raised by Appellant. No such process of extinction by evasion should be permitted to be utilized.

Summary of Points Undisputed in Points TI and III

Point II - Despite Appellant's substantial showing of defense counsel's ineffectiveness, and resulting prejudice, the government failed to challenge or dispute, in any manner, the facts presented. These claims must he accepted as factual and correct. Appellant has clearly pointed to specific errors and omissions that document the fact that he did not receive reasonably, competent and effective assistance of counsel which has seriously prejudiced Appellant causing his sentence to be unfairly enhanced.

The government did not bear its burden of persuading the Court of Appeals, beyond a reasonable doubt, that counsel's ineffectiveness did not deny Appellant of a fair hearing or proceeding. See United States v. Tucker, 216 F.3d 576 (1983)(9th Cir.) - p.577 Item 10, Key 116.11, Item 13, Key 1163(2).

No government dispute to the following ineffective counsel facts:

- Defense Counsel failed to bring before the Court the testimony of 2 A. G. Edwards V.P. 's that contradict the government's and the Court's findings regarding alleged kickbacks, and failed to object to the increase to alleged monetary loss calculation of alleged kickbacks. (Pages 14-16, Memorandum, pp. 26-40, 1989 Bond Refunding).

- Defense Counsel failed to correct the Court in its mischaracterization of loss as opposed to testified costs. see, pp. 26-29.

- On pp. 30-33, defense counsel "stipulates", without Appellant's consent to the reliance on Government Exh. CH-9, to "sell bond deal" to BOCF. The schedule in the Exhibit was not available to Appellant as the Court assumed. Defense counsel fails to correct the Court on its reliance. Impact $4.7 million added to loss calculation enhancement. This "stipulation" is unconstitutional. p.33.

- Defense counsel fails to ask government's expert to produce his work papers, that were subpoenaed and thereby hampering defense expert witness to challenge government's report, thus prejudicing Appellant.

- C-P-36 defense counsel failed to enforce the appearance of subpoenaed witness at sentencing. p. 36-40.

Since no response or challenge is made by government each must be accepted as true and accurate. The subsequent new discovery emphasizes the prejudicial impact on Appellant's due process, and his sentence.

Point III Appellant's Fifth Amendment Rights Denied by Action of U.S. Attorney - Thereby Obstructing Justice By Denying Appellant the Right of Discovery. Newly Discovered Evidence Was Previously concealed. pages 41-48.

Government fails to respond or challenge Appellant's assertion of:

- Prosecutorial Misconduct in their unholy alliance with the SEC and their interference with Appellant's right of discovery. Appellant charges that these acts were pre-meditated and prejudicial.

- Government lied in their response to Appellant's Direct appeal to this Third Circuit regarding their successful quashing of Appellant's subpoena for discovery of SEC files. They untruthfully state, that "no discovery was done by either party up until the time of the District Court's Order staying discovery." The newly discovered SEC documented evidence reveals this untruth (Exh. T).

- Government fails to address Appellant's claim of prejudiced due process impact, proven by the newly discovered evidence, previously denied.

- Government fails to respond to Appellant's claim of a violation of his 5th Amendment Rights by their improper acquiring and using of

Appellant's 1995 SEC deposition testimony. SEE. pages 44-47 Memorandum of Law. The government violated the "strict limitation on discovery in criminal cases, embodied in Federal Rules of Criminal Procedure 15-17". Dresser, Id. at 1381, p.45.

Clear sentencing errors: unchallenged and ignored by the district court and now the government is the detailed documented evidence that the Court committed an egregious error in enhancing Appellant's sentence as follows:

- The government's expert, in his certification, calculating an alleged loss as a result of the 1989 Bond Refunding transaction used and relied on a government's exhibit that was irreconcilable. This Exhibit CH-9 was not available to Appellant as, was assumed, when the Bond proposal was presented to the BOCF or was it part of the Bond transaction documents.

- The Court erred when they assumed that this Exhibit was a critical document that defendant relied on to "sell this deal" to the Essex County Board of Freeholders. See Appellant's Exhibit N, sentencing transcript 9/10/98 - P.69. Appellant could not have relied on this document, prepared by the underwriter for the simple reason that it was not available until almost 5½ months after the Bond closing. The Court further emphasizes their position, and thus compounds the error. See Appellant Exh. N - Page 76 ..."then I [the court] shall rely on them".

- Defense counsel, at the sentencing hearing, then "stipulates" to the Court error that defendant relied on the document, (government Exh. CH-9). This further prejudiced Appellant's due process rights. This "stipulation" was without Appellant's consent. It was accepted by the Court without the Court exercising its responsibility to determine whether the consequences of this "stipulated" admission by defense counsel was understood by the defendant/Appellant and/or whether he consented to same. This stipulation is unconstitutional and resulted in a $4.7 million enhancement to an alleged monetary loss calculation.

- The district court, in denying Appellant's §2255 Petition never responded to or addressed these major errors. The government in their "Opposition" to Appellant's Application for a Certificate of Appealability totally ignores these claims, supported with documentation, and by so doing shuns their responsibility as a representative of the people to ensure "innocence does not suffer", "that justice shall be done." Berger v. U.S., 295 U.S. 78 (1934).

These sentencing errors can and should be corrected as this Circuit has demonstrated in prior cases, Judge Rendell stated in Vasquez, 271 F.3d 93 (2d Cir. 2001), p. 127 Footnote (2):

> "we previously addressed sentencing errors such as those implicated by a trial Court's improper guidelines calculation, and found that such mistakes are sufficiently prejudicial to warrant relief under the plain error standard. E.g.,

> United States v. Felton, 55 F.3d 861, 869 n.3 (3d Cir. 1995)("This Circuit and others have found that the miscalculation of a defendant's offense level certainly is an error that seriously affects the defendant's rights and so amounts to plain error")(quoting United States v. Pollen, 978 F.2d 78, 90 (3d. Cir. 1992). Pollen, 978 F.2d at 90 ("The district court's improper calculation --- resulting in a significantly higher guideline sentencing range, certainly is an error that seriously affected [defendant's] substantial rights and so amounts to plain error").

The facts as documented, in the case at bar, clearly meets this criteria. The errors should be corrected and the sentence vacated.

LEGAL ARGUMENT

POINT I - It Is Undisputed That Ring Is Applicable To The Case At Bar, and It's Required Jury Findings of Pecuniary Loss Is Indispensable, Structured and The Essence of The Sixth Amendment Guarantee Under Ring That Portion of the Sentencing Regime To the Contrary Be Struck as Unconstitutional.

A. Ring v. Arizona is Retroactive Per Se.

The attempted murder of Ring, by the government, by aiming only at, and substituting Apprendi is fatal to the government's plot.

In part I (c) pp. 17-25 of Appellant's "Memorandum of Law" the Appellant undisputedly establishes that Ring, unlike Apprendi, was declared, per se, retroactive by the United States Supreme Court, id. pp. 19-21 (Appellant's

Memorandum of Law). The government does not dispute this. Instead, it submits a pre-Ring generic Teague argument regarding Apprendi. In its 14 pages of avoidance of the current real issue, the government further fails to recognize the four (4) cases in which it unequivocally applied Ring retroactively. Those cases are clearly set forth in Appellant's Memorandum of Law, pp. 21-23, i.e., Harrod v. Arizona, Samsing v. Arizona, Pendell v. Arizona and particularly note the seismic jolt to the prosecutorial antagonism, by the Supreme Court, in declaring a portion of a similar Federal Statute, unconstitutional retroactively, in Allen v. United States, id., pp. 22-23.

The pre-Ring generic attempt to separate constitutional justice from this Third Circuit, in cases of structural jury violations through an unconstitutional sentencing regime is intentional and purposely does not address Allen. Treating this Court as a robot, it also sorrowfully ignores Chief Judge Becker's continued faithfulness and constitutionally friendly opinions to this Appellant's plight. See Exh. B of Appellant's Appendix in Support of his Application for a Certificate of Appealability and Memorandum of Law, i.e., "Third Circuit the Forerunner to Ring".

In United States v. Vasquez, 271 F.3d 93 (3d Cir. 2000), p.107, Chief Judge Becker relates to a pointedly observation of Justice Frankfurter that:

> "wisdom too often never comes, and so one ought not to reject it merely because it comes too late".

Henske v. Union Planters Nat'l Bank & Trust Co., 335 U.S. 395, 600, 69 S.Ct. 290, 93 L.Ed. 259 (1949 Frankfurter, J. dissenting.

Judge Becker continues –

> "but he was surely right in so declaring". "Had he the occasion he might also have observed that sometimes belated wisdom does not arrive until doctrinal shift removes the obstacles to its revelation, thereby exposing the unstable foundation of that which had been uncritically accepted before". id., p. 108.

Appellant submits that the case at bar demonstrates an opportunity to apply the "wisdom" of the United States Supreme Court's decision that continue to remind us of ones Fifth and Sixth Amendment Rights, and their prospective application from 1789 to date of its respect and enforcement.

Lastly, the government deceitfully cites a myriad of cases involving successive §2255 motions to support its non-retroactively position. Not surprisingly, they fail to acknowledge, to this Court, that such cases, including Teague and its 2nd successive progeny cases is totally inapplicable. They do not apply to an initial §2255 Petition. Further ignored is the congressional 1996 Amendment that governs the right to file this initial §2255 Petition, under 28.U.S.C.A. Chpt. 153, Id. p. 17-19 (Appellant's Memorandum of Law) and pp. 3-4 (Appellant's Application for a Certificate of Appealability). Time and length restrictions of this "Reply" do not allow a detailed showing of inapplicability of each case cited.

Thus, Ring must be given respect in application in this case on several bases:

1. This is an initial §2255 Petition, permitted by congressional statue - post Teague.

2. Ring v. Arizona itself, in declaring portions of legislation that permits such unconstitutional 6th Amendment violations as per se void ab initio, by its ruling, is retroactive,

i.e., constitution avoidness of a law, today, yesterday and tomorrow.

3. Ring v. Arizona has very specifically been applied retroactively by the United States Supreme Court as shown in detail in the Appellant's Memorandum of Law, of which none of these are disputed by the government.

B. Ring clearly rejects the Prosecutorial "Formalistic" Indeterminate Maximum Penalty and Guideline Exemption Rhetoric.

The government's response not only does not address Ring v. Arizona, but attempts to encourage this Third Circuit to continue to be drowned in the government's rhetoric of non-application of the 6th Amendment guarantee to sentences below the indeterminate statutory maximum penalty. It disregards the fact that the "Federal Sentencing Reform Act" repealed that method of sentencing. Further, it [government] urges that the Federal Sentencing Guidelines, binding law, are exempt from 6th Amendment protection. This is like a dying man drinking from the cup of wrath.

Ring v. Arizona is an end to such absurdity on both scores.

1. STATUTORY MAXIMUM IS THAT MAXIMUM FIXED BY A JURY AND NOT THE OLD INDETERMINATE FORMALISTIC STATUTORY MAXIMUM.

Ring deems the old indeterminate "formalistic" statutory maximum argument of no consequences. It is the "effect" and "impact" of the jury verdict that sets the maximum under Ring, see Exh. B of Appellant's filing. The Supreme Court clearly terminates such a formalistic device to trash the right to trial by jury. It outright instructs all Circuits

that the maximum penalty is fixed by the "effect" and parameters of the jury verdict. If that verdict lacks the aggravating facts of quantifying a pecuniary loss or fact, the sentence cannot be aggravated by that fact no matter what the form of the old indeterminate statue provides. Likewise, Ring is a "Tsunami" wave that submerges once and for all the attempts to exempt the Sentencing Guidelines from jury guarantee.

2. RING REQUIRES THE SIXTH AMENDMENT JURY GUARANTEE TO APPLY TO THE BINDING FEDERAL SENTENCING GUIDELINES.

As forcefully set forth, in detail, in Appellant's Memorandum of Law, Ring eviserates the myth that the 6th Amendment does not apply to the Guidelines. Here, the government is faced with a paradox. Prior to Ring (and even still here) it argues that the Guidelines give the sentencing judge the power to aggravate a sentence beyond the parameters of the jury verdict. The Guidelines Are Binding Law. Then, it argues that the guidelines do not have the status to permit it, the 6th Amendment protection. Again, wrong on both fronts. Ring declares unconstitutional any portion of a law setting up a sentencing regime permitting a judge to substitute his fact finding, for a jury. Also see, United States v. Allen, decided after Ring and discussed in Appellant's Memorandum of Law.

The guidelines admittedly established narrow maximum incarceration ranges for different amounts of pecuniary losses. The sentencing judge is required to remain within the designated guideline range. Congress requires that different persons convicted of the same pecuniary facts, respecting a designated loss category, not be incarcerated more than designated by the guidelines. The constitution requires that those facts be found by a jury under Ring.

A further response to the government's position regarding the non-applicability of the Federal Sentencing Guidelines, is their blatant disregard to the "Sentencing Reform Act", a law, a statue, whose purpose was to address the archaic indeterminate sentencing ranges of the old statutes. The Federal Sentencing Guidelines are approved by Congress as the only mandate for sentencing. There is no option or alternatives. Contrary to the government's inaccurate presentation of Appellant's sentencing exposure, the Courts and the Probation Sentencing Report (PSI) are confined to use the methodology presented in the Sentencing Guideline Law. In Appellant's case, despite the litany presented by the government, the Sentencing Guideline level, based on the conviction of all counts charged is computed to a maximum base level 10. The fact that there were multiple counts, the maximum increase allowed under the statutory limitations of the Federal Sentencing Reform Act, is an increase of two (2) levels, thereby bring the jury verdict penalty to a level twelve (12). This is the basic Federal Sentencing Guideline limit, which has been referred to by many, including Justices of the United States Supreme Court, as having the "force and effect of law". Appellant has presented these facts and this position in his Memorandum of Law. The government chooses to ignore this and offers no rebuttal as to the accuracy of Appellant's position. Appellant submits that the government's silence is affirmation of acceptance of Appellant's facts and presentation regarding U.S. Sentencing Guideline maximum in this case.

Again, in this Third Circuit, Judge Sloviter, in a dissenting opinion eloquently expresses his fears regarding the 6th Amendment jury guarantee violations. In United States v. Vasquez, 271 F.3d 93 (3d Cir. 2001) - p. 126, states:

> "I believe the majority opinion undermines, indeed nullifies, the long tradition in American Constitutional criminal jurisprudence that it is the

> jury, rather than the judge, that must determine the offense for which the defendant has been sentenced and that it must so find beyond a reasonable doubt".

Judge Sloviter follows with a footnote (4) p. 126, quoting Justice Scalia in Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), quoting from Blackstone:

> "However convement [intrusions on the jury right] may appear at first, (as doubtless, all arbitrary powers, well executed, are the most convement), yet let it be again remembered that delays and little inconvenience in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred Bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern". Neder, 527 U.S. at 39-40 (quoting Blackstoñe, commentaries §350).

DISTRICT COURT RECOGNIZES RING V. ARIZONA

Notwithstanding this Third Circuit's cited concerns respecting ones constitutional due process Jury guarantees, Appellant's District Court chose to ignore and not address the mandate of Ring v. Arizona. However, in line with the concerns expressed by this Third Circuit's Appeal Judges, cited in this reply (Becker, Sloviter and Rendell) a constitutionally conscience judge, in the Western District of Pennsylvania, has recognized the watershed impact. of the United States Supreme Court's June 24, 2002 mandates. The Court has shown respect to the clear declaration of the High Court and has issued a Certificate of Appealability, finding a

substantial showing of a constitutional denial of defendant's rights, in light of Ring v. Arizona, where a judge alone made the pecuniary factual findings required to enhance a sentence on the basis of loss, see United States v. Brooks, Docket No. 02-4437 . This matter is presently pending before the Court.

CONCLUSION

On the basis of the above, and the more detailed Memorandum of Law, Exhibits, pleadings and documents filed in the District Court, and the Application for a Certificate of Appealability and Supporting Memorandum of Law filed with this Circuit Court, Appellant requests that the Certificate of Appealability be granted and that his sentence be vacated and modified to be limited to the crime of conviction found by the jury.

Respectfully submitted,

December 26, 2002

Joseph P. Galluzzi
Pro Se Appellant

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Third Circuit - The Forerunner To Ring

3rd Circuit Cases	Precurser	Ring Fulfillment
United States v. Spinner, 180 F.3d 514 (3rd Cir. 1999)	Leading Authority In Nation: Indictment must contain all elements of crime / unconstitutionality of lacking an element. Jurisdictional defect. Dismissal even after conviction by plea / post-conviction.	Under 6th Amendment jury must find (not judge) "existence of the fact that an aggravating factor existed"; "whether the statue calls them elements of the offense, sentencing factors, or Mary Jane **** must be found by the jury beyond a reasonable doubt."
Post Apprendi - Ring Predecessors		
July 23, 2000, Washington Post, pg. A 1, Chief Justice Becker Announces Publicly the "enormous" Substantial Importance of Apprendi v. New Jersey and the Commitment of Third Circuit To It.		
United States v. Mack, 229 F.3d 226 (3rd Cir. 2000)	Chief Judge / concurring opinion: Expresses concern about majority reference to 8th and 5th Circuit's attempt to limit Apprendi by narrow formalistic statutory maximum (F.N. 12 of majority). id. 236. Warning that "viewed through lens of the separate opinions" of Justice of Supreme Court an enormous "implication for the legitimacy of a variety of sentencing schemes, including the United States Sentencing Guidelines ***". id. 236. Warning that method of attempting to exempt from 6th Amendment protection by a formalistic statutory maximum "approach to determining a prescribed statutory maximum is in tension with the methodology applied by the Supreme Court in Apprendi". id. 239. That approach urged here "appears foreclosed by Apprendi". id. 239. "In the wake of a retroactively unsettling Supreme Court pronouncement *** I have no desire for a repeat performance, or to contribute to the constitutional	Deems formalistic statutory maximum approach "meaningless"; the "effect", not the "form", of the finding of fact has on the sentence is the test. If the "effect" "makes an increase in a defendant's authorized punishment contingent on the finding of a fact" that finding must be by the jury. "The Sixth Amendment does not permit a defendant to be exposed *** to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone". Deeming that form method and approach is in violation of the 6th Amendment guarantee. Foreclosing use of the narrow statutory maximum approach; imposition of sentence even if below formal statutory maximum is unconstitutional if pecuniary facts not specifically found by jury. The declaring of a portion of legislative scheme of sentencing as unconstitutional; it is per se retroactive nullifying

Third Circuit - The Forerunner To Ring

3rd Circuit Cases	Precurser	Ring Fulfillment
United States v. Pressler, (contd.).	"Prescribed maximum" is the longest sentence possible "within the jury verdict.". id. Third Circuit joined 6th Circuit United States v. Strayhorn, 250 F.3d 462 (6th Cir. 2001) and United States v. Ramirez, 242 F.3d 348 (6th Cir. 2001).	
Knight v. United States, 266 F.3d 203 (3rd Cir. 2001), remanded by United States Supreme Court.	Where a sentence was imposed using the wrong guideline range of the crime of conviction it constitutes per se an impact on substantial rights and prejudice.	It is the "exposure" of what defendant is potentially "exposed" beyond the limit of facts found by the jury that dictates constitutionality.
United States v. Vasquez, 2 1 F.3d 93 (3rd Cir. 2001) (en banc)	"*** sometimes belated wisdom does not arrive until a doctrine shift removes the obstacles to its revelation, thereby exposing the unstable foundation of that which had been uncritically accepted before. I believe this is such a case.". id. The sentencing aggravating facts should not be treated as only sentencing "factors only when they increase the prescribed statutory maximum penalty" in a formalistic context. Reliance is placed on "the two recent cases of Jones and Castillo, Supreme Court observed that the degree to which the commission of a prohibitive act increases the maximum penalty reflects Congress' intent to make that particular act an element or a sentencing factor.". id. "*** dramatic differences in the severity of punishment" demonstrates pragmatically the unconstitutionality of such a sentencing approach. id.	The robotic distinction previous made by some Circuits between "elements" and "sentencing factors" is now firmly eviscerated. "*** whether the statue calls them elements of the offense, sentencing factors, or Mary Jane - must be found by a jury beyond a reasonable doubt.". id. Any "argument" of "distinction relied upon *** between elements of the offense and sentencing factors ***" "As to elevate the maximum punishment" beyond the jury verdict is "untenable". The test is "who decides" judge or jury. When a "sentencing factor" is used to enhance the punishment beyond the facts submitted to the jury "it is the functional equivalent of an element of a greater offense than the one covered by the jury verdict". id. When this occurs "the Sixth Amendment requires they be found by a jury". id. "WHAT TODAY'S DECISION SAYS IS THAT THE JURY MUST FIND THE EXISTENCE OF THE FACT THAT AN AGGRAVATING FACTOR EXISTED". id.

Third Circuit - The Forerunner To Ring

3rd Circuit Cases	Precurser	Ring Fulfillment
United States v. Mack, (contd.).	haze enveloping the appropriate relationship between judge and jury in our system of criminal justice. I do, however, believe that it has been useful to explore one aspect of the Apprendi problem with which the judiciary will doubtless soon be required to grapple.". id. 244. Chief Judge Becker's analysis requires that the first step is to look at the jury verdict alone.	the statutory authority past, present and future. The "perilous decline" of the jury guarantee "over the last 12 years" required restoration. The Court unequivocally declares that it is the jury verdict alone that dictates the sentence.
United States v. Pressler, 256 F.3d 144 (3rd Cir. 2001)	On July 2, 2001, 8 months after Mack, the unconstitutionality of the guideline scheme permitting a judge to erode the jury verdict by use of "relevant conduct" enhancement was declared. The "crime of conviction" sets the sentencing boundaries. The "offense of conviction" clearly "includes only the facts underlying the specific offense for which the defendant was convicted the history supports this position also.". id. Stressing that the "prescribed statutory maximum" is constrained by what the jury finds. That fixes the guideline prescribed maximum statutory range, i.e., if no loss found it is a level 6. "The novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, expose the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury alone.". id. Limiting of United States v. Williams to cases of guilty pleas with stipulation of the aggravating facts.	Portion of statutory scheme permitting judge to move to an aggravated crime or "outer limits" of punishment beyond constraint of jury findings is unconstitutional, on its' face or as implemented. "*** the jury must find the existence of the fact that an aggravating factor existed". id. The jury guarantee applies to "non-capital defendants", as well as "capital defendants". There is "no reason to differentiate". id. Any other position would "senselessly" diminish the fact-finding issue of the jury, which "requirement" is "enshrined in our constitution in criminal cases; they must be found by the jury beyond a reasonable doubt". id. "Aggravating factors", like pecuniary facts, must be specifically found by the jury not the judge. "Pecuniary" facts have a long tradition in common law and in statutory vintage is in the sole domain of the jury. id. Where a "statue authorizes a maximum penalty *** only in a formal sense" the constitution does not permit such a "meaningless and formalistic rule of statutory drafting" to infringe on the jury role of fact-finding.

Third Circuit - The Forerunner To Ring

3rd Circuit Cases	Precurser	Ring Fulfillment
United States v. Vasquez, (contd.).	"*** it strains credibility, however, to assert that Congress intended for type and quantity to be treated as a sentencing factor in some cases and as elements in others". id. As to the necessity to specify in the indictment such aggravating facts (not objected to by Vasquez) and submit to the jury (objected to by Vasquez) "the sky will (not) fall", citing United States v. Promise, 255 F.3d 150, 151 n.6 (4th Cir. 2001). In diversity of opinions, all were in unity that the failure to submit such essential facts to the jury is fatal.	

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOSEPH P. GALLUZZI	)	
Petitioner,	)	
v.	)	C.A. No. 02-3267
UNITED STATES OF AMERICA	)	
Respondent.	)	

PETITION FOR REHEARING IN BANC OR REHEARING BEFORE PANEL

Petitioner does hereby file this Petition for Rehearing In Banc or in the alternative, for a Rehearing Before the Panel.

I Certify that this document was given to prison officials on May 8, 2003 for forwarding to the Court of Appeals. I certify under penalty of perjury that the foregoing is true and correct. 28 U.S.C. §1746.

I. The Miller-El Mandate: Overlooked or Misapprehended

The decision of this Court, of April 29, 2003, (Exh. A), at issue here is without opinion, reasoning, analysis or any independent "full consideration" as required by Miller-El v. Cockrel, No. 01-7662, 2003 WL431659 (u.s. Feb. 25, 2003).

The full panel decision is in a two sentence denial as follows:

> "However, the foregoing request for a certificate of appealability is denied. The District Court's conclusion that appellant's claims are meritless is not debatable among jurists of reason". Citing Miller-El v. Cockrel.

The petitioner anticipates filing a Petition for a Writ of Certiorari before the United States Supreme Court (in view of the importance and conflict of the issues at bar). Therefore, an expression of reasoning and "full consideration" is hereby request from this Third Circuit Court of Appeals In Banc or by the Panel.

The Panel's April 29, 2003 Order, though it cites Miller-El, "has overlooked or misapprehended" the reasoning and essence of Miller-El. In fact, its two (2) sentence conclusionary denial, without full consideration, reasoning or analysis is antagonistic to the recent Supreme Court mandate. It unwittingly demonstrates exactly what the reasoning of Miller-El rejects. It mimically repeats the very fatality to which this Petitioner complains. The District Court in its conclusion, and the Government in their November 26, 2003 Opposition to Petitioner's "Request for a Certificate of Appealability" also fails to address essential issues raised by the Petitioner.

In addition, the District Court, aware of the dramatic findings of the U.S. Supreme Court in Ring v. Arizona, No. 01-488 (6/24/02)(which emphasized the constitutional right to a defendant, to a jury determination of the facts that determine a sentence), chose to ignore any reference to Ring. The Government in its "Opposition" to Petitioner's Application, also fails to address or respond to Ring v. Arizona, despite the fact that that decision was clearly cited throughout Petitioner's Application and Memorandum of Law. The Government instead, cites Harris v. United States, 122 S.Ct. 2406 (6/24/02) also decided on the same day as Ring, but is completely not applicable to Petitioner's case and issues.

The Petitioner asked this Appellate Court to address Ring v. Arizona. However, the Panel overlooked Ring by its terminating denial based upon the "District Court's conclusion that Appellant's claims are meritless...".

The District Court did not determine that the Ring challenge was meritless. In fact, by its' choice not to address Ring, it is reasonable that that jurist could not dispute it, nor can this Circuit Court. Similarly, the same is true respecting the District Court/Panel's failure to address the ineffective counsel assertions, that are supported by documented evidence and facts which are more than mere speculation.

The Petition for an In Banc or Panel review is requested primarily on the issues that the District Court and the Government, in their Opposition did not dispute. These issues were never addressed, reviewed, analyzed or commented to and therefore it is reasonable for Petitioner and this Court to consider them undisputed. The failure to, at least review the claims and offer comment, should trigger this appeals court to consider this as a substantial showing of the denial of a constitutional right, and grant the requested "Certificate of Appealability" Silence; on these critical

issues and claims, do not, under any semblance of due process categorize them as meritless. The Petitioner, and certainly this Court, is entitled to the reasons for blatant disregard of the existence and the Supreme Court decisions, brought forth by the Appellant, and the obvious errors made by the sentencing judge. These errors drastically impacted on the appellant in the form of a draconian sentence, imposed by the sentencing judge without regard to his obligation to protect a defendant's due process rights.

Silence and/or the refusal to address these claims and issues is an attempt by the government and the District Court to evade the violation of a substantial constitutional right, such as the 6th Amendment guarantee to a jury determination.

Petitioner's Application for a Certificate of Appealability, Memorandum of Law, Supporting Appendix/Exhibits, and most importantly, his "Reply" to Government's Opposition, not only establishes the basis for appeal, but documents his non-refutable claims with revealing transcripts and discovered documents to warrant a serious review of the appeal.

When Miller-El is reviewed, the following is clearly the standard directed by the United States Supreme Court:

The Fifth Circuit did exactly what the District Court did here. The Panel in the case-at bar presumed that the District Court acted in accord with its' judicial duty. c.f. Miller-El similar presumption by the Fifth Circuit relying there on the State Court failures. The High Court in Miller-El therefore held "the Fifth Circuit should have issued a C.O.A. to review the District Court's denial of the habeas relief to petitioner". The same is true in this case.

The Panel overlooked or misapprehended the US. Supreme Court's requirement of "full consideration" which must be demonstrated by expressed reasoning:

> "... the Court of Appeals should limit its' explanation to a threshold inquiry into the underlying merits of his claims". id.

That "examination" never occurred by the District Court, thus an Appellate decision, solely relying on the District Court falls short of the "full consideration" by "examination" standard of Miller-EL

Further:

> "... a prisoner seeking a C.O.A. need only demonstrate a substantial showing of the denial of a constitutional right"- id.

In this regard, the court's attention is directed to the Appellant's reply to the Government's Opposition to Request for a Certificate of Appealability that respectfully should be read in its entirety.

Further:

> "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented, were adequate to deserve encouragement to proceed further. Slack supra at 484. Applying these principles to petitioner's application, we conclude a C.O.A. should have been issued". id.

The adoption of the District Court's conclusion, as "not debatable among jurists of reason" by the Panel without

addressing the issues ignored by the District Court leaves the denial incomplete in the words of Miller-El without "full consideration".

The truss of the Panel's expediency, in the lack of a Miller-El "examination" results now in the need for a rehearing. The system expressed by Miller-El is meaningful. Where the fullness of its' essential requirements is feigned by a generic C.O.A. denial, the Petitioner's substantial constitutional rights have become violated. The Panel unfortunately places more blind faith in Judge Wall's than was justified. This sweeping adoption carries the baggage of the District Court's fatal constitutional violation.

It is therefore respectfully requested that a rehearing permitting "full consideration" and "examination" of the substantial issues shunned by the adoptee Judge be granted. Petitioner requests the independent scholarly and constitutional review of this Panel which it so inherently possesses but for a heavy case load on its' agenda.

II. Rehearing In Banc: Conflict Among Circuit Panels

It is essential to secure and maintain uniformity of this Circuit's decisions respecting the recognition of the United States Supreme Court's decision in the case of Ring v. Arizona, 483 (6/24/02)(see Appellant's Reply to Government's Opposition, p.2-4. Also Appellant's Application for C.O.A. pp. 1-4 and Memorandum of Law pp. 4-13).

As a result of the Panel's decision dated April 29, 2003, there is a serious split and conflict between the decision of the various Panels respecting the exceptionally important 6th Amendment guarantee of a trial by jury issue.

A. Conflict of Third Circuit Panels Re: Sixth Amendment Guarantee Mandated in Ring v Arizona.

This case presents the important ultimate issue of the unconstitutionality of that portion of the Federal Sentencing Guidelines that permits, as here, a District Court to aggravate a crime beyond the jury verdict. The jury verdict returned a level 10 crime and the district Court, the judge alone, increased the penalty to a level 28 crime. This Appellant's Application for a Certificate of Appealability, Appellant's Memorandum of Law In Support of Application for a C.0.A. and Appellant's Reply to Government's Opposition to Request for a Certificate of Appealability, provides a firm basis for the 6th Amendment violation in this case. Those pleadings are incorporated herein by reference for sake of brevity. However, the Panel's rejection of Ring v- Arizona via the proxy of the district Court's avoidance leaves the Third Circuit now in a horrible state of instability and conflict. There is no perceivable reconciliation. Worst, at least one member of this Panel has expressed a scholarly contrary position on the issue, that separates himself from a kinship of opinion with the District Court.

Judge Sloviter in a dissenting opinion eloquently expresses his fears regarding 6th Amendment guarantee violations.

In United States v. Vasquez, 271 F.2d 93 (3d Cir. 2001) p. 126, states:

> "I believe the majority opinion undermines, indeed nullifies, the long tradition in American Constitutional criminal jurisprudence that it is the jury, rather than the judge, that must determine the offense for which the defendant has been sentenced and that it must so find beyond a reasonable doubt".

Judge Sloviter follows with a footnote (4) p. 126, quoting Justice Scalia in Neder v. United States, 527 U.S. 1, 119 S.Ct. 1287, 144 L.Ed.2d 35 (1999), quoting from Blackstone:

> "However convenient [intrusions on the jury right] may appear at first, (as doubtless, all arbitrary powers, well executed, are the most convenient), yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred Bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern". Neder, 527 U.S. at 39-40 (quoting Blackstone, Commentaries §350).

This Panel's endorsement of the District Court has sacrificed the long credible judgment of Chief Judge Becker and other Third Circuit jurists. As the prior submissions of the Appellant set forth in detail this Third Circuit has prior leadership in the country on this issue. Exhibit "B", in Appellant's Appendix/Exhibits previously submitted, provides the major Third Circuit cases that are in direct conflict with the C.0.A. rejection here. (see Exh "B" Third Circuit - The Forerunner To Ring).

A mere brief profile makes the point of the severe violation of Petitioner's 6th Amendment Jury guarantee.

Ring holds that the portion of a statutory regime that permits a sentencing judge to enhance the level of the crime of conviction, as here, is unconstitutional. The District Court here was blind to this premise. The Panel in their decision appears to endorse this avoidance.

The U.S. Supreme Court clearly directed in Ring that its decision applies to both capital and non-capital cases.

> "What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed" Ring v Arizona, No. 01-488, June 24, 2002 (Scalia, J. concurring at page 4).

> "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment". We see no reason to differentiate capital crimes from all others in this regard". Ring, id. at p. 2 and 21, Op. of the Court, Ginsburg, J.

> "The right to a trial by jury, guaranteed by the Sixth Amendment, would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death". "We hold the Sixth Amendment Applied to both". Ring, id. at 23 — Ginsburg, J. Op. of the Court.

Ring would be rendered "meaningless" and a mere "formalistic rule of statutory drafting" if this Circuit would now subordinate its' prior decisions to that of the District Court's erroneous view of the role and meaning of "statutory maximum". (see Appellant's "Memorandum of Law" pp. 9-13 and Appellant's "Reply to Government Opposition" pp. 9-15).

The Supreme Court was crystal clear as to the reason for Ring:

> "over the last 12 years excelerating propensity ... to increase punishment beyond that authorized by the

> jury verdict ... cause me to believe that our peoples traditional belief in the right of trial by jury is in perilous decline. Accordingly, ..., whenever those factors (aggravating factors) exist they must be subject to the usual requirement of the common law, and to the requirement enhanced in our Constitution in criminal cases. They must be found by the jury beyond a reasonable doubt"- Ring v. Arizona, Scalia, J., concurring. (see Appellant's Reply to Government Opposition p. 3).
>
> Justice Scalia further emphasizes: "Whether the statue calls them elements of the offense, sentencing factors or Mary Jane - must be found by a jury beyond a reasonable doubt." Ring, id. (see Appellant's Memorandum of Law p. 12).

Ring and Apprendi are not synonymous. Ring is not merely an extension of Apprendi. Ring is not merely procedural as the government describes Apprendi. Ring is not, as the prosecutor describes Apprendi, mere "hypothesizing" by the United States supreme Court. (see Government "Opposition", p-9). It is such mockery and disregard for the Supreme Court's 5th and 6th Amendment direction in Apprendi that caused that Court in Ring to bring a halt to such an erroneous perception. (see Appellant's Reply p. 3-4).

Ring Parallels The Pecuniary Loss Enhancement In This Case.

The United States Supreme Court, on June 24, 2002, reversed a death penalty sentence based on a pecuniary gain aggravating factor. The Court stated that the Sixth Amendment guarantee of the right to a jury trial had been violated, because the judge and not the jury made the factual findings required for the imposition of the increased

sentence, beyond the scope of the jury verdict. That portion of the statutory scheme, that permitted the violation was struck as unconstitutional.

The Court made it clear that there is no difference in the Sixth Amendment sentence violations when a jury convicts a "white collar" defendant, as here, of charges that did not include a pecuniary loss. A sentencing judge is constitutionally constrained by the jury's crime of conviction verdict where no pecuniary loss is found. The jury verdict provides the maximum range for the punishment to be inflicted under the mandatory federal sentencing law (i.e. Federal Sentencing Guidelines) Here, the jury finding had no pecuniary specification. A loss level was not a charge for the jury to consider, therefore, the verdict must be considered to be without any such finding. The judge cannot change that verdict. The District Court's fatal conclusion was adopted by the Panel. As a result, a serious conflict exists now in this Circuit's decision in Mack, Pressler, Knight and Vasquez.

In Appellant's case, the statutory maximum varied among the charges. The final sentence, however, was enhanced, as in the Ring case, based on certain aggravating factors such as pecuniary gain or loss that was found by a judge conducting the sentencing hearing alone. Ring deems this unconstitutional.

Mandatory sentencing ranges, under the Federal Sentencing Guidelines, as adopted by Congress, are limited to those authorized by a jury verdict. The Supreme Court found unconstitutiona the Arizona sentencing scheme that allowed a judge to impose a greater penalty, than that dictated by the jury verdict, based on aggravating factors of pecuniary gain, presented at said sentencing hearing. So too was the finding of the sentencing of the sentencing judge in Appellant's case.

· Ring's declaration of unconstitutionality of that portion of a statutory scheme, that permits evisceration of a constitutional jury guarantee applies here. see Appellant's "Memorandum of Law", pp. 17-25.

B. Conflict of the Panel with U.S. Supreme Court and Third Circuit Rulings; Re: Ineffective Counsel, Prosecutorial Misconduct and Due Process Requires a Hearing In Banc for Restoration of Security and Unity.

· Ineffective Counsel Claims - The Government and the District Court failed to challenge, or dispute in any manner, the facts presented, in form of averments - and therefore must be accepted as factual and correct. This incompetent and ineffective assistance of counsel did prejudice Appellant, causing his sentence to be unfairly enhanced. The government and the District Court, by their silence, did not meet the standard of rebutting Appellant's showing of a substantial constitutional violation, nor did they bear the burden of persuading the Court of Appeals, beyond a reasonable doubt, that counsel's ineffectiveness did not deny Appellant of a fair hearing or proceeding. (see Appellant's Reply to Government Opposition pp. 4-5).

· Counsel's failure to remind Court of testimony that contradicts the District Court's findings re: enhancement for alleged monetary loss and obstruction of justice. (see Memorandum of Law pp. 14-16, 26-40 and referenced Exhibits).

· Counsel failed to correct Court re: mischaracterization of cost to loss. (Memorandum, pp. 26-29 and referenced Exhibits).

· Defense Counsel's stipulation, without Appellant's consent, to the Court's reliance on a document not available to Appellant, as Court assumed. This reliance impacted Appellant's sentence by more than four (4) years. This stipulation is unconstitutional. (see Memorandum of Law pp. 30-33 and referenced Exhibits).

· Defense counsel failed to secure work-papers from government witness, that were subpoenaed and thereby hampering defense expert witness to challenge government report - causing prejudice to appellant. (see Memorandum of Law p. 33 and referenced Exhibits).

· Defense counsel failed to enforce the appearance of subpoenaed defense witness at sentencing. Sentencing judge dismisses need for witness. (see Memorandum of Law and referenced Exhibits).

· Prosecutorial Misconduct - Appellant's Fifth Amendment Rights Denied by U.S. Attorney - Newly Discovered Evidence Claim ignored by Government. Pages 41-48 Memorandum of Law and referenced Exhibits (see also p. 6 Appellant's Reply to Government Opposition).

· Unholy alliance with the SEC, interfering with Appellant's right of discovery.

· Government lies in their Response to Appellant's Direct Appeal - regarding their successful quashing of Appellant's subpoena for discovery of SEC file. (Exh Q and Exh T).

· Newly discovered evidence provides basis for Appellant's claim of prejudice to due process right. Government, evades, avoids, ignores, fails to address claims. pp. 48 and 47 Memorandum of Law.

· Government fails to respond to Appellant's claim of 5th Amendment Rights violation, by their improper acquiring of and use of Appellant's 1995 SEC deposition testimony. Government violated the "strict limitation of discovery in criminal cases, embodied in Federal Rules of Criminal Procedure 15-17". (Dresser, id. at 1381. p. 45)(see Memorandum of Law pages 44-47 and referenced Exhibits).

· Clear Sentencing errors cited - were ignored by the District Court and the Government. (see Appellant's Reply to Government Opposition pages 6-8 and referenced Exhibits and cases cited).

· Legal Argument - Undisputed Application of Ring v. Arizona and Sixth Amendment Guarantee see pages 8-15 Appellant's Reply to Government Opposition, see also pages 17-25, Appellant's Memorandum of Law and referenced Exhibits.

Note page 9, U.S. v. Vasquez, 271 F.3d 93 (3rd Cir. 2000) p. 107 Judge Becker relates to a pointedly observation of Justice Frankfuter that:

> "wisdom too often never comes, and so one ought not to reject it merely because it comes too later'. Henske v. Union Planters National Bank & Trust Co., 335 U.S. 395, 600, 69 S.Ct. 290, 93 L.Ed. 259 (1949 Frankfurter, J. dissenting).
>
> Judge Becker continues:
>
> "but he was surely right in so declaring". "Had he the occasion he might also have observed that sometimes belated wisdom does not arrive until doctrinal shift removes the obstacles to its revealation, thereby exposing the unstable foundation of that which had been uncritically accepted before" id., p. 108.

CONCLUSION

Based on the above, Appellant hereby requests the granting of a Re-hearing In Banc or by the Panel regarding a Certificate of Appealability and a reversal of the District Court's decision.

Respectfully submitted,

May 8, 2003

Joseph P Galluzzi
Pro Se Appellant
Post Office Box 2000
Lewisburg, PA 17837

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-6351

UNITED STATES OF AMERICA

v.

JOSEPH P. GALLUZZI

Appellant

Appeal from the Final Judgment of Sentence of the United States District Court for the District of New Jersey (Crim. No. 96-640).
Sat Below: Honorable William Walls, U.S.D.J.

BRIEF FOR APPELLEE

FAITH S. HOCHBERG
United States Attorney
Attorney for Appellee
970 Broad Street
Newark, New Jersey 07102-2535
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On the Brief:

SHAWNA H YEN
Assistant United States Attorney

POINT VI

THE GOVERNMENT ACTED PROPERLY IN CONDUCTING THE CRIMINAL CASE AGAINST GALLUZZI SEPARATELY FROM THE SEC INVESTIGATION OF GALLUZZI

Galluzzi makes the frivolous argument that the U.S. Attorney's Office engaged in "prosecutorial misconduct," supposedly by abusing the SEC's civil investigative powers in issuing subpoenas for the purposes of the criminal case against him. This argument is completely meritless.

It is well settled "[t]he civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possiiblity of parallel civil and criminal proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence." SEC v. Dresser Industries, Inc, 628 F.2d 1368, 1374 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980); see United States v. Kordel, 397 U.S. 1, 11—12 (1970).

In this case, the U.S. Attorney's Office (through the FBI), and the SEC, conducted parallel but completely separate and independent investigations into Essex County municipal bond transactions. Although the SEC and the U.S. Attorney's Office cooperated in their separate investigations as permitted by law, they conducted separate grand jury investigations.

The superseding indictment in the instant case and the SEC's federal civil complaint against Galluzzi were both filed against Galluzzi on January 9, 1997. (A4, SA2400). However, the U.S. Attorney's Office moved to intervene and

to stay discovery in the civil action pending the resolution of the criminal case. (SA2419— 2422). By Order of December 8, 1997, the district court granted the U.S. Attorney's Office's motion to intervene; and the court ordered that discovery in the SEC's civil action be stayed until completion of the instant criminal case against Galluzzi. (SA2423). As the docket sheet of the SEC civil action reveals, no discovery was done by either party up until the time of the district court's order staying discovery. (SA2426—2428). Therefore the civil discovery process was not used to advance the criminal case against Galluzzi. Moreover, the U.S. Attorney's Office did not need to use the SEC's civil discovery tools, given that it obtained all of the information that it needed from its own separately conducted criminal grand jury investigation.

Galluzzi fails to make any colorable claim as to the nature of the supposed "prosecutorial misconduct." There is not one shred of evidence that the U.S. Attorney's Office improperly used the SEC's civil investigatory powers. Galluzzi does not identify a single piece of documentary evidence that was allegedly gathered improperly. Notably, Galluzzi did not allege that any search warrant or search affidavit was based on information based on the SEC's civil investigation. Nor did Galluzzi raise his "prosecutorial misconduct" challenge to any of the documents as they were being introduced at trial. In fact, the first time that Galluzzi raised his "prosecutorial misconduct" theory was post-trial. Galluzzi has also failed to allege or show how he suffered substantial prejudice as a result of the claimed "prosecutorial misconduct."

The cases that Galluzzi cites are either unhelpful to him and completely distinguishable. In United States v. LaSalle Nat'l Bank, 437 U.S. 298, 313—318 (1978), the Court held that it was error for the district court to refuse to enforce IRS summonses, where the respondents had failed to

show that the summonses were not issued in good—faith pursuit of congressionally authorized purposes. In this case, Galluzzi has not made any specific allegations, let alone come forth with any evidence, that the SECs investigatory subpoenas were improperly issued.

In SEC v. Dresser Industries, Inc., 628 F.2d 1368 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980), another case that Galluzzi cites, the court held that the Justice Department's investigation of the defendant did not preclude the SEC from issuing subpoenas in the course of a parallel investigation of the same defendant. Id. at 1385.The court further held that the defendant would not be entitled to a protective order prohibiting the SEC from providing the Justice Department with the fruits of its civil discovery. Id. Dresser supports the government's position that parallel civil and criminal investigations are common occurrences that are unobjectionable in most instances. Galluzzi has failed to allege any specific facts or produce any evidence showing that the SEC was acting in bad faith or using malicious tactics; or that his rights were prejudiced; such that the parallel investigations should be deemed improper under Dresser. Yet another case that Galluzzi cites, SEC v. Gilbert, 79 F.R.D. 683 (S.D.N.Y. 1978), is inapposite because it deals with discovery rather than the pre-indictment investigation that is at issue in the present case.

Finally, any alleged error by the grand jury in indicting Galluzzi also must be harmless, given that Galluzzi was convicted on all counts. See United States v. Console, 13 F.3d 641, 672 (3d Cir. 1993) (in affirming the district court's denial of defendants' pretrial motion to dismiss the indictment on the ground of alleged prosecutorial misconduct, the Court reasoned that even if the prosecutorial misconduct occurred as alleged by defendants, "the petit jury's guilty verdict rendered any prosecutorial misconduct before the indicting grand jury harmless."), cert. denied, 511

U.S. 1076 (1994); United States v. Mechanik, 475 U.S. at 70—72 (holding that any error in the grand jury's charging decision that may have flowed from permitting two law enforcement agents to testify in tandem, in violation of Fed. R Crim. P. 6(d), was rendered harmless by the petit jury's guilty verdict). As the Supreme Court stated in Mechanik:

> ...Rule [6(d)] protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty. ...But the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.

Mechanik, 475 U.S. at 70.

UNITED STATES
SECURITIES AND EXCHANGE COMMISION
NORTHEAST REGIONAL OFFICE
7 WORLD TRADE CENTER
NEW YORK, N.Y. 10043

March 7, 1997

Ralph Marra, Esq.
United States Attorney's Office
District of New Jersey
970 Broad Street; Room 502
Newark, New Jersey 07102

Re: Certain Municipal Securities Transactions (NY-6085)

Dear Ralph:

Enclosed please find a copy of the testimony of Joseph Galluzzi. If you need anything else, please do not hesitate to call me at (212) 748-8368.

Very. truly yours,

Ten A. Brotbacker
Senior Attorney

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In the Matter of Joseph P. Galluzzi
Documents being withheld as provided by SEC Rule of Practice 230(b)

Doc No.	Document Type	Length	Date	Author/Source	Recipient	Subject Matter	Reason for Withholding
1	Internal Memorandum	18 pages	Undated	Commission staff (attorney)	Commission staff	Draft copy of Order Instituting Public Administrative Proceedings	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
2	Internal Memorandum	15 pages	Undated	Commission staff (attorney)	Commission staff	Draft copy of Order Instituting Public Administrative Proceedings	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
3	Internal Memorandum	15 pages	Undated	Commission stall (attorney)	Commission staff	Draft copy of Order Instituting Public Administrative Proceedings	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
4	Internal Memorandum	3 pages	Undated	Commission staff (attorney)	Commission staff	Draft copy of Order Instituting Public Administrative Proceedings	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)

5	Internal Memorandum	15 pages	Undated	Commission staff (attorney)	Commission staff	Draft copy of Offer Of Settlement	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
6	Internal Memorandum	3 pages	Undated	Commission staff (attorney)	Commission staff	Draft copy of appendix to Action Memorandum	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
7	Internal Memorandum	33 pages	Undated	Commission staff (attorney)	Commission staff	Draft copy of Memorandum in Support Of The Motion For Summary Judgment And Permanent injunction And Other Equitable Relief in SEC v. Joseph P. Galluzzi	Work-product, Rule 230(b)(ii)
8	Internal Memorandum	4 pages	Undated	Commission staff (attorney)	Commission staff :	Draft copy of Proposed Final Judgment of Injunction and	Work-product, Rule 23 (b)(ii)

						Other Equitable Relief in SEC v. Joseph P. Gallüzzi	
9	Internal Memorandum	2 pages	*3/30/99*	Anthony J. Bosco	Commission staff	Draft copy of Declaration Of Service in SEC v. Joseph P. Galluzzi	Work-product, Rule 230QD)(ii)
10	Internal Memorandum	20 pages	Undated	Commission staff (attorney)	Commission staff	Draft copy of Reply In Support Of Motion For Summary Judgment in SEC v. Joseph P. Galluzzi	Work-product, Rule 230(b)(ii)
11	Internal Memorandum	4 pages	Undated	Commission staff (attorney)	Commission staff :	Draft copy of Proposed Final Judgment Of Permanent Injunction And Other Equitable Relief in SEC v. Joseph P. Galluzzi	Work-product, Rule 230(b)(ii)
12	Internal Memorandum	18 pages	Undated	Commission staff (attorney)	Commission staff	Draft copy of Reply In Support Of Motion For	Work-product Rule 230(b)(ii)

						Summary Judgment in SEC v. Joseph P. Galluzzi	
13	Internal Memorandum	44 pages	1/3/96	Ten A. Brotbacker	Commission staff	Draft copy of Action Memorandum	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
14	Internal Memorandum	12 pages	11/25/96	Commission staff (attorney)	Commission staff	Supplemental Action Memorandum with staff notes	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
15	Internal Memorandum	12 pages	11/25/96	Northeast Regional Office (attorney)	The Commission	Supplemental Action Memorandum	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
16	Internal Memorandum	11 pages	11/25/96	Ten A. V Brotbacker	Commission staff	Draft copy of Supplemental Action Memorandum	Work product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
17	Internal	12	12/31/96	Northeast	The	Action	Work-product,

	Memorandum	pages		Regional Office (attorney)	Commission	Memorandum .	Deliberative process, Attorney-Client, Rule 230(b)(ii)
18	Internal Memorandum	2 pages	Undated	Ten A. Brotbacker	Commission staff	Draft copy of Declaration Of Service in SEC v. Joseph P. Galluzzi	Work-product, Rule 230(b)(ii)
19	Internal Memorandum	7 pages	10/8/96	Northeast Regional Office (attorney)	The Commission	Action Memorandum	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
20	Internal Memorandum	25 pages	11/7/96	Northeast Regional Office (attorney)	The Commission	Action Memorandum	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
21	Internal Memorandum	10 pages	2/17/95	Ten A. Brotbacker	Commission staff	Draft copy of Action Memorandum	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
22	Internal Memorandum	5 pages	2/22/95	Ten A. Brotbacker	Commission staff	Draft copy of Action	Work-product, Deliberative

						Memorandum	process, Attorney-Client, Rule 230(b)(ii) V
23	Internal Memorandum	11 pages	11/25/96	Ten A. Brotbacker	Commission staff	Draft copy of Supplemental Action Memorandum	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
24	Internal Memorandum	12 pages	1/16/97	Teri A. Brotbacker	Commission staff	Draft copy of Action Memorandum	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
25	Internal Memorandum	15 pages	12/22/93	Commission staff (Attorney)	Commission staff	Draft of memorandum	Work-product, Deliberative process, Law Enforcement, Attorney-Client, Rule 230(b)(ii)
26	Internal Memorandum	7 pages	9/22/99	Elizabeth Baier	Anthony J. Bosco	Analysis of pre-judgment interest	Work-product, Rule 230(b)(ii)
27	Spreadsheet	1 page	2/16/99	Commission staff (attorney, or examiner/investi	Anthony J. Bosco	Analysis of pre-judgment interest	Work-product, Rule 230(b)(ii)

				gator acting at attorney's direction)			
28	Internal Memorandum	4 pages	1/9/95	Ten A. Brotbacker	Commission staff	Draft copy of Summary Memorandum	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
29	Internal Memorandum	34 pages	1/9/95	Ten A. Brotbacker	Commission staff	Draft copy of Action Memorandum	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
30	Internal Memorandum	10 pages	2/17/95	Ten A. Brotbacker	Commission staff	Draft copy of Action Memorandum	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
31	Internal Memorandum	11 pages .	11/25/96	Ten A. Brotbacker	Commission staff	Draft copy of Supplemental Action Memorandum	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
32	Internal Memorandum	14 pages	Undated	Commission staff (attorney)	Commission staff	Draft copy of Order Instituting	Work-product, Attorney Client,

						Public Administrative Proceedings	Rule 230(b)(ii)
33	Internal Memorandum	2 pages	Undated	Commission staff (attorney)	Commission staff	Draft copy of Administrative Release	Work-product, Rule 230(b)(ii)
34	Internal Memorandum	18 pages	Undated	Ten A. Brotbacker	Commission staff	Draft copies of Notice of Motion, Declaration, Memorandum of Law, and Order in SEC v. Joseph P. Galluzzi	Work-product, Rule 230(b)(ii)
35	Copy of Testimony transcript	17 pages	7/25/95	Commission staff (attorney, or examiner/investigator acting at attorney's direction)	Commission staff	Copy of transcript with Commission staff notes and analysis written on transcript	Work-product, Rule 230(b)(ii)
36	Correspondence	3 pages	7/19/95	Faith S. Hochberg	Richard H. Walker	Request for access to Commission files	Law enforcement, Interagency communication
37	Correspondence	5 pages	5/12/93	Richard H. Walker	Howard E. Heiss	Request for access to Commission files	Law enforcement, Interagency communication

38	Correspondence	2 pages	5/6/93	Howard E. Heiss	Carmen J. Lawrence	Request for access to Commission files	Law enforcement, Interagency communication
39	Notes V	1 page	Undated	Commission staff (attorney)	Commission staff	Investigative testimony	Work-product, Rule 230(b)(ii)
40	Notes	7 pages	Undated	Commission staff (attorney, or examiner/investigator acting at attorney's direction)	File	Galluzzi investigation	Work-product, Rule 230(b)(ii)
41	Notes	10 pages	2/27/95	Commission staff (attorney, or examiner/investigator acting at attorney's direction)	File	Galluzzi investigation	Work-product, Rule 230(b)(ii)
42	Correspondence	2 pages	3/14/96	Jean E. Murphy	Colleen P. Mahoney	Request for access to Commission files	Law enforcement, Interagency communication
43	FBI Form	28 pages	8/30/94	Andrew P. Bingaman	Commission staff	Interview with George L. Tuttle	Law enforcement, Work-product on USAO's/FBI's behalf
44	FBI Form -	9 pages	10/20/94	Andrew P.	Commission	Interview with	Law enforcement,

				Bingaman and Charles Dougherty	staff	George L. Tuttle	Work-product on USAO's/FBI's behalf
45	FBI Form	3 pages	11/29/94	Andrew P. Bingaman	Commission staff	Interview with George L..Tuttle	Law enforcement, Work-product on USAO's/FBI's behalf
46	FBI Form	6 pages	12/1/94	Andrew P. Bingaman	Commission staff	Interview with George L. Tuttle	Law enforcement, Work-product on USAO'sJFBI's behalf
47	FBI Form	1 page	12/5/94	Andrew P. Bingaman	Commission staff	Interview with George L. Tuttle	Law enforcement, Work-product on USAO's/FBI's behalf
48	FBI Form	2 pages	3/1/95	Andrew P. Bingaman	Commission staff	Interview with George L. Tuttle	Law enforcement, Work-product on USAO's/FBI's behalf
49	FBI Form	4 pages	1/31/95	Andrew P. Bingaman	Commission staff	Interview with Charles J. Ferraioli	Law enforcement, Work-product on USAO's/FBI's behalf
50	FBI Form	2 pages	1/31/95	Andrew P. Bingaman	Commission staff	Interview with Paul J.Cuva	Law enforcement, Work-product on

							USAO's/FBI's behalf
51	Spreadsheet	3 pages	6/19/97.	Commission staff (attorney, or examiner/investigator acting at attorney's direction)	Commission staff	Analysis of deposit records	Work-product, Rule 230(b)(ii)
52	Spreadsheet	4 pages	6/19/97	Commission staff (attorney, or examiner/investigator acting at attorney's direction)	Commission staff	Analysis of withdrawal records	Work-product, Rule 230(b)(ii)
53	Spreadsheet	15 pages	6/19/97	Commission staff (attorney, or examiner/investigator acting at attorney's direction)	Commission staff	Analysis of deposit records	Work-product, Rule 230(b)(ii)
54	Spreadsheet	7 pages	6/19/97	Commission staff (attorney, or examiner/investigator acting at attorney's	Commission staff	Analysis of withdrawal records	Work-product, Rule 230(b)(ii)

				direction)			
55	Spreadsheet	9 pages	9/11/97	Elizabeth Baier	Elizabeth Baier	Analysis of bank records	Work-product, Rule 230(b)(ii)
56	Spreadsheet	10 pages	Undated	Elizabeth Baier	Elizabeth Baier	Analysis of bank records	Work-product, Rule 230(b)(ii)
57	Spreadsheet	25 pages	Undated	Elizabeth Baier	Elizabeth Baier	Analysis of bank records	Work-product, Rule 230(b)(ii)
58	Telephone call notes	1 page	10/31/95	Elizabeth Baier	File	Note regarding status of document production	Work-product, Rule 230(b)(ii)
59	Telephone call notes	1 page	10/20/95	Elizabeth Baier	File	Note regarding status of document production	Work-product, Rule 230(b)(ii)
60	Spreadsheet	9 pages	Undated	Commission staff (attorney, or examiner/investigator acting at attorney's direction)	Commission staff -	Analysis of bank records	Work-product, Rule 230(b)(ii)
61	Exhibit index	5 pages	Undated	Commission staff (attorney)	Commission staff	Rudi testimony exhibits	Work-product, Rule 230(b)(ii)
62	Spreadsheet	3 pages	Undated	United States Attorney's Office- District of New Jersey	Commission staff	Galluzzi criminal trial summary of evidence	Law enforcement, Work- product on United States Attorney's

							Office's behalf
63	SEC Form	2 pages	1/9/97	Commission staff (attorney)	Daisy Velez	Galluzzi investigation	Work-product, Deliberative process, Attotney-Client, Rule 230(b)(ii)
64	SEC Form	1 page	1/9/97	Andrew Wertheim	Daisy Velez	Galluzzi investigation	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
65	Notes	51 pages	Undated	Teri A. Brotbacker	Teri A. Brotbacker	Notes made in preparation for investigative testimony of David Mark Brownstein	Work-product, Rule 230(b)(ii)
66	Notes	5 pages	Undated	Teri A. Brotbacker	Teri A. Brotbacker	Notes made in preparation for investigative testimony of Thomas Banker	Work-product, Rule 230(b)(ii)
67	Notes	5 pages	Undated	Teri A. Brotbacker	Teri A. Brotbacker	Notes made in preparation for investigative testimony of	Work-product, Rule 230(b)(ii)

						George Schneider	
68	Notes	13 pages	Undated	Teri A. Brotbacker	Teri A. Brotbacker	Notes made in preparation for investigative testimony of Joseph P. Galluzzi	Work-product, Rule 230(b)(ii)
69	Notes	9 pages	Undated	Teri A. Brotbacker	Teri A. Brotbacker	Notes made in preparation for investigative testimony of Nicholas Amato	Work-product, Rule 230(b)(ii)
70	Notes	5 pages	Undated	Teri A. Brotbacker	Teri A. Brotbacker	Notes made in preparation for investigative testimony of Jerome Greco	Work-product, Rule 230(b)(ii)
71	Notes	5 pages	Undated	Teri A. Brotbacker	Teri A. Brotbacker	Notes made in preparation for investigative testimony of Thomas Jordan	Work-product, Rule 230(b)(ii)
72	Notes	7 pages	Undated	Teri A. Brotbacker	Teri A. Brotbacker	Notes made in preparation for investigative testimony of	Work-product, Rule 230(b)(ii)

						Robert Brown	
73	Telephone call notes	2 pages	7/22/96	Commission staff (attorney)	File	Conversation with Joseph Auriemma	Work-product, Law enforcement, Rule 230(b)(ii)
74	Telephone call notes	1 page	12/1/95	Elizabeth Baier	File	Conversation with Robert Jones	Work-product, Law enforcement, Rule 230(b)(ii)
75	Notes	1 page	11/27/96	Elizabeth Baier	File	Interview of Len Coleman	Work-product, Law enforcement, Rule 230(b)(ii)
76	Notes	1 page	Undated	Elizabeth Baier	File	Interview of Ronald Halper	Work-product, Law enforcement, Rule 230(b)(ii)
77	Notes	1 page	12/6/96	Elizabeth Baier	File	Interview of George Longo	Work-product, Law enforcement, Rule 230(b)(ii)
78	Notes	2 pages	Undated	Elizabeth Baier	File	Conversation with Longo's attorney	Work-product, Law enforcement, Rule 230(b)(ii)
79	Notes	3 pages	10/24/95	Elizabeth Baier	File	Interview with Sara Bost	Work-product, Law enforcement, Rule 230(b)(ii)
80	Notes	2 pages	10/28/95	Elizabeth Baier	File	Interview with Sara Bost	Work-product, Law enforcement, Rule 230(b)(ii)

81	Notes	2 pages	10/18/96	Elizabeth Baler	File	Interview with Thomas Giblin	Work-product, Law enforcement, Rule 230(b)(ii)
82	Correspondence	6 pages	3/26/96	Elizabeth Baier	Ralph J. Mama	Access request	Law enforcement, Interagency communication
83	Legal research	45 pages	Undated	Commission staff (attorney)	Commission staff	Legal research	Work-product, Rule 230(b)(ii)
84	Notes	29 pages	Undated	Commission staff (attorney, or examiner/investigator acting at attorney's direction)	File	Galluzzi investigation	Work-product, Rule 230(b)(ii)
85	Notes	3 pages	2/28/97	Elizabeth Baier	File	Analysis and inventory of records	Work-product, Rule 230(b)(ii)
86	Notes	2 pages	8/4/97	Commission staff (attorney, or examiner/investigator acting at attorney's direction)	File	Galluzzi investigation	Work-product, Rule 230(b)(ii)
87	Internal	7 pages	10/8/96	Northeast	Division of	Action	Work-product,

	Memorandum			Regional Office	Enforcement	memorandum	Deliberative process, Attorney-Client, Rule 230(b)(ii)
88	Internal Memorandum	37 pages	1/9/95	Commission staff (attorney)	Commission staff	Draft copy of Summary Memorandum and Action Memorandum	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
89	Notes	68 pages	Undated	Anthony J. Bosco	Anthony J. Bosco	Notes made in preparation for investigative testimony of Nicholas Rudi	Work-product., Rule 230(b) (ii)
90	Spreadsheet	1 page	Undated	Commission staff (attorney, or examiner/investigator acting at attorney's direction)	Commission staff	Analysis of records	Work-product, Rule 230(b)(ii)
91	Correspondence	16 pages	12/29/98[2]	Ralph J. Marra	Anthony J. Bosco	Galluzzi investigation	Law enforcement, Interagency communication

[2] On the previous Privilege Log, this entry was incorrectly dated 3/26/96.

92	Internal Memorandum	25 pages	11/7/96	Commission staff (attorney)	Commission staff	Draft copy of Action Memorandum with staff notes	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
93	Notes and Legal research	10 pages	Undated	Commission staff (attorney)	File	Legal research	Work-product, Rule 230(b)(ii)
94	Internal Memorandum	19 pages	Undated	Commission staff (attorney)	Commission staff	Draft copy of complaint for SEC v. Joseph P. Galluzzi	Work-product, Rule 230(b)(ii)
95	Internal Memorandum	19 pages	Undated	Commission staff (attorney)	Commission staff	Draft copy of complaint for SEC v. Joseph P. Galluzzi	Work-product, Rule 230(b)(ii)
96	Internal Memorandum	9 pages	Undated	Commission staff (attorney)	Commission staff	Draft copy of Final Consent Judgment of Permanent Injunctive and Other Relief for SEC v. Joseph P. Galluzzi	Work-product, Rule 230(b)(ii)
97	Internal Memorandum	3 pages	Undated	Commission staff (attorney)	Commission staff	Draft copy of Order Instituting Proceedings for In	Work-product, Deliberative process, Attorney-

						the Matter of Joseph P. Galluzzi	Client, Rule 230(b)(ii)
98	Internal Memorandum	4 pages	Undated	Commission staff (attorney)	Commission staff	Draft copy of Offer of Settlement for In the Matter of Joseph P. Galluzzi	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
99	Internal Memorandum	2 pages	**2/23/95**	Commission staff (attorney)	Commission staff	Draft copy of correspondence to George L. Tuttle, Jr.	Work-product, Rule 230(b)(ii)
100	Notes	25 pages	Undated	Teri A. Brotbacker	File	Summary of all investigations in case	Work-product, Rule 230(b)(ii)
101	Witness lists	20 pages	7/18/97 and 8/14/97	Elizabeth Baier	Commission staff	List of witnesses in a case, sorted by name, deal association/employer	Work-product, Law Enforcement, Rule 230(b)(ii)
102	Correspondence	1 page	4/1/97	Teri A. Brotbacker	Ralph J. Marra	Access request	Law enforcement, Interagency communication
103	Correspondence	4 pages	3/26/97	Elizabeth Baier	Claire M. Catan	Access request	Law enforcement, Interagency communication

104	Correspondence	1 page	12/17/96	Teri A. Brotbacker	Ralph J. Marra	Access request	Law enforcement, Interagency communication
105	Correspondence	1 page	3/21/96	Teri A. Brotbacker	Michael Horowitz	Access request	Law enforcement, Interagency communication
106	Correspondence	1 page	3/7/97	Teri A. Brotbacker	Ralph J. Marra	Access request	Law enforcement, Interagency communication
107	Correspondence	1 page	2/27/97	Teri A. Brotbacker	Claire M. Catan	Access request	Law, enforcement, Interagency communication
108	Correspondence	1 page	1/14/97	Teri A. Brotbacker	Ralph J. Marra	Access request	Law enforcement, Interagency communication
109	Correspondence	1 page	11/22/96	Teri A. Brotbacker	Ralph J. Marra	Access request	Law enforcement, Interagency communication
110	Correspondence	2 pages	3/15/95	Faith S. Hochberg	Andrew Geist	Request for access to Commission files	Law enforcement, Interagency communication
111	Notes	1 page	Undated	Elizabeth Baier	File	Note regarding status of document production	Work-product, Rule 230(b)(ii)
112	Correspondence	8 pages	2/10/98	Elizabeth Baier	Ralph J. Marra	Access request	Law enforcement,

							Interagency communication
113	Notes	20 pages	Undated	Commission staff (attorney, or examiner/investigator acting at attorney's. direction)	File	Galluzzi investigation	Work-product, Rule 230(b)(ii)
114	Spreadsheet	5 pages	Undated	Elizabeth Baier	Commission staff	Analysis of First Fidelity Settlement	Work-product, Rule 230(b)(ii)
115	Notes	17 pages	Undated	Commission staff (attorney, or examiner/investigator acting at attorney's direction)	Commission staff	Draft of First Fidelity Settlement with staff handwritten notes	Work-product, Rule 230(b)(ii)
116	Notes	31 pages	Undated	Commission staff (attorney)	Commission staff	Draft copies of Offer of Settlement and Order Instituting Public Administrative Proceedings	Work-product, Deliberative process, Attorney-Client, Rule 230(b)(ii)
117	Correspondence	1 page	12/27/95	Andrew Geist	Michael Horowitz	Draft of Order	Law enforcement
118	Correspondence	3 pages	1/26/98	Faith S.	Elizabeth	Access request	Law enforcement,

				Hochberg	Baier		Interagency communication
119	Correspondence	4 pages	4/18/96	Elizabeth Baier	Ralph J. Marra	Access request	Law enforcement, Inter-agency communication
120	Correspondence	5 pages	7/2/97	Andrew Wertheim	Ralph J. Marra	Galluzzi litigation	Law enforcement
121	Correspondence	23 pages	10/15/96	Ralph J. Marra	Teri A. Brotbacker	Proposed indictment	Law enforcement, Work-product on United States Attorney's Office's behalf
122	Correspondence	9 pages	1/9/98	Ralph J. Marra	Elizabeth Baier	Document analysis	Law enforcement, Work-product on United States Attorney's Office's behalf
123	Correspondence	1 page	3/13/98	Anthony J. Bosco	Michael Chagares	Galluzzi litigation	Law enforcement
124	Correspondence	30 pages	3/10/97	Mary Jo White	Teri A. Brotbacker	Access request	Law enforcement, Interagency communication
125	Internal Memorandum	3 pages	Undated	Elizabeth Baier	Commission staff	Summary of Rudi document production	Work-product, Rule 230(b)(ii)

126	Spreadsheets with copies of supporting documents and staff notes	3 redweld	Varied	Varied (attorney, or. examiner/investigator acting at attorney's direction)	Elizabeth Baier and Teri A Brotbacker	Galluzzi investigation and litigation	Work-product, Rule 230(b)(ii)
127	Correspondence	5 pages	Undated	Ralph J. Marra	Teri A. Brotbacker	Document production	Law enforcement
128	Correspondence	9 pages	Undated.	Ralph J. Marra.	Elizabeth Baier	Galluzzi investigation	Law enforcement
129	Correspondence	7 pages	10/28/96	Ralph J. Marra	Teri A. Brotbacker	Galluzzi investigation	Law enforcement
130	Computer database file	2166 records	Varied	Elizabeth Baier	Elizabeth Baier	Inventory for In the Matter of Certain Municipal Securities Transactions (NY-6085)	Work-product, Rule 230(b)(ii)
131	Correspondence	204 pages	10/3/95	Ralph J. Marra	Elizabeth Baier	Unfinalized copies of transcripts between Joseph P. Galluzzi and George L. Tuttle	Law enforcement, Work-product at United States Attorney's Office's request, Inter-agency communication

132	Correspondence	25 pages	10/2/96	United States Attorney's Office- District of New Jersey	Commission staff	Proposed indictment	Law enforcement, Work- product on United States Attorney's Office's behalf

Privilege Log Name Index

Name on Privilge Log	Title
Andrew P. Bingaman	Special Agent, Federal Bureau of Investigation
Andrew Geist	Former Associate Regional Director, NERO, SEC
Andrew Wertheim	Former Assistant Regional Director, NERO, SEC
Anthony J. Bosco	Former Branch Chief, NERO, SEC
Carmen J. Lawrence	Former Regional Director, NERO, SEC
Charles Dougherty	Special Agent, Federal Bureau of Investigation
Claire M. Catan	Special Investigation - Enforcement, NASD Regulation, Inc.
Colleen P. Mahony	Former Deputy Director, SEC
Daisy Velez	Paralegal, SEC
Elizabeth Baier	Supervisory Securities Compliance Analyst, Branch of Investigations, SEC (worked with attorneys handling this investigation and at their direction)
Faith S. Hochberg	United States Attorney for the District of New Jersey
FBI	Federal Bureau of Investigation

Howard E. Heiss	Chief, United States Attorney's Office for the Southern District of New York
Jean E. Murphy	Supervising Investigator, Department of Law and Public Safety, State of New Jersey
Mary Jo White	United States Attorney for the Southern District of New York
Michael Chagares	Assistant United States Attorney, United States Attorney's Office, District of New Jersey
Michael Horowitz	Assistant Unites Stated Attorney, United States Attorney's Office, Southern District of New York
NERO	Northeast Regional Office, United States Securities and Exchange Commission
Ralph J. Marra	Assistant United States Attorney, Unites States Attorney's Office, District of New Jersey
Richard H. Walker	Director, Division of Enforcement, SEC
SEC	United States Securities and Exchange Commission
Teri A. Brotbacker	Former SEC Staff Attorney
The Commission	United States Securities and Exchange Commission
USAO	United States Attorney's Office

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AFFIDAVIT

I Felipe Ferrand being of full age and having been duly sworn due hereby say:

1. I am the owner of Ferrand Jordan & Company located at 300 First Stamford Place, Stamford, CT.. We are specialists in Financial Software and consultant's to the public financial community, developing the optimal financing plans for advance refundings and other technically demanding transactions. I have been qualified as an expert in relation to the case of U.S. v. Joseph P. Galluzzi.

2. For the purpose of this matter, I was contracted by Joseph P. Galluzzi to review a 1989 $104 million dollar refunding bond transaction issued by the County of Essex, New Jersey, for the purpose of determining whether this transaction as structured did or did not have any economic benefit to the County of Essex.

3. That as part of this engagement, I received by Federal Express, under cover letter of Mr. Galluzzi, dated August 18, 1998, 24 listed items of documents pertaining to this $104 million dollar refunding bond issue.

4. That after reviewing the information provided to me regarding this bond issue, I requested the following additional information
   (a) A copy of Mark Egland's (Government Expert) workpapers and calculations to support

his findings, and

(b) A copy of the verification report, with supporting documents, as prepared by Samuel Klein & Company.

5. That Mr. Galluzzi did provide me, on September 1, 1998, with all of the information obtained from Samuel Klein & Company, necessary to confirm their calculations in the "Verification Report", which they prepared to support the $104 million dollar refunding bond issue.

6. That Mr. Galluzzi notified me that the governments' expert (Mark Egland) workpapers were not provided to him or his attorney's, Durkin & Durkin, and therefore were not available for review.

7. That I stated to Mr. Galluzzi that, without Mr. Egland's workpapers, I would not be able to review and confirm Mr. Egland's calculations, which concluded that the County of Essex suffered an economic loss of $4.7 million dollars as a result of the 1989 $104 million dollar bond issue.

8. That sometime during the week of August 24, 1998, at a meeting in the offices of Durkin & Durkin, (Mr. Galluzzi's attorney's) I met with Dennis Durkin and Mr. Galluzzi to review my preliminary findings and discuss the error that Mr. Egland made in his Certification Report. During the meeting I emphasized to Dennis Durkin, that although the information I received from Mr. Galluzzi was significant, I needed Mr. Egland's workpapers or schedules reflecting his calculations that supported his conclusions. Mr.

Durkin said that he would subpoena these records for the sentencing hearing.

9. That Mr. Galluzzi informed me that his attorney's (Durkin & Durkin), on September 2, 2000, subpoenaed Mr. Egland and his workpapers for appearance and production at the September 8, 1998 sentencing hearing.

10. That based on the information made available to me, along with Mr. Egland's report of December 3, 1997 and his certification received by Durkin & Durkin on August 5, 1998, I concluded that Mr. Egland had committed a major error in his findings. Furthermore, based on the same information, and using Mr. Egland's methodology, I concluded that the County of Essex, in fact, experienced an economic benefit of $2.7 million dollars.

11. That on September 10, 1998, I testified as an expert for the defense at Mr. Galluzzi's sentencing hearing attesting to my written report dated September 3, 1998, with supporting workpapers and calculations, but I was unable to provide sufficient support to defense counsel, (Dennis Durkin) in his cross-examination of Mr. Egland because I was not provided with any of Mr. Eglands' supporting workpapers or calculations.

Executed this _11th_ day of __September__, 2000.

_____
Felipe Ferrand (Affiant)

State of Connecticut

County of _Fairfield_

Then appeared before me the above named affiant Felipe Ferrand, being duly sworn and acknowledges this affidavit to be his free act and deed.

_____
Notary Public

My Commission Expires:
___4-30-2002____

SEAL

TO: Local Finance Board Members **MEETING DATE:** 5/10/95
FROM: Beth Gates, Chair **REPORT DATE:** 5/1/95
SUBJECT: Staff Report on the Application of the:

County of Essex
N.J.S.A. 40A:2—51 & 2—54
$28,795,000 — Refunding Bonds

The following is a staff report from the Division's Bureau of Financial Regulation and Assistance regarding the application named above:

The County of Essex is seeking Board approval for the issuance of $28,795,000 in general obligation refunding bonds, as permitted under N.J.S.A. 40A:2—51 and specifically N.J.S.A. 40A:2—54, for the purpose of refunding all or a portion of the principal and interest due on County indebtedness from July 1, 1995 to December 31, 1995. The request is being made to reduce the 1995 financial burden resulting from front—loaded debt service requirements. The proceeds of the refunding bonds will be utilized to pay principal maturing in 1995 and interest due on the maturity date.

Since the 1986 Tax Reform Act limits the number of times obligations may be refunded in advance, the refunding bonds may be required to be issued at one or more times during 1995. A portion of the refunding bond, relating to the taxable Series 1989A bonds, in the amount of $1,000,000, may have to be issued on a taxable basis.

Included in the refunding bond ordinance is the payment of issuance costs not to exceed $875,000. In its proposed application, the County details $720,153 in issuance costs, of which $250,155 has been allocated for a yet unnamed underwriter and $319,998 for a bond insurer. The proposed issuance represents a projected tax decrease of $.076 in 1995, an increase of $.004 in the years 1996 to 2003,

an increase of $.008 in years 2004 to 2006, and an increase of $.019 in years 2007 to 2010.

The maximum amount of refunding bonds to be authorized is $28,795,000, while the proposed amount of refunding bonds to be issued is $27,795,000. Based on current market conditions, the County will realize a negative present value savings of $405,701, representing 1.54 percent of the refunded indebtedness. Although this is below the percentage of present value savings the Board normally requires, this refunding bond request must be viewed as a component of the County's overall fiscal recovery plan detailed in staff's executive summary.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CLRCUIT

UNITED STATES OF AMERICA

v.

JOSEPH P. GALLUZZI, Appellant No. 98-6351

ON APPEAL FROM A JUDGMENT OF CONVICTION OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

REPLY BRIEF FOR TEE APPELLANT

SAT BELOW: HONORABLE WILLIAM WALLS, U.S.D.J.

DURKIN & DURKIN
Attorneys for Appellant
Joseph P. Galluzzi
1120 Bloomfield Avenue
PO Box 1289
West Caldwell, New Jersey 07007
(973) 244-9969

Of Counsel: Dennis A. Durkin
On the Brief: David D.F. Lawrence

contention. The Government, however, fails to point out on the next page that Mr. Ferrand refused to concede this point stating that the reports presented were not sufficient to reach a conclusion of what Egland's calculations were (A489). It must be noted that Egland failed to provide working papers which had been subpoenaed preventing the Court from reviewing his calculations. (This Court should bear in mind that Ferrand was forced o testify prior to Egland. As such, he was refuting argument that Egland has not yet testified to.)

The Government's failure to identify any errors in Ferrand's report or testimony is significant. The District Court was charged to evaluate whether the Government satisfied its burden of proof warranting a loss calculation adjustment. Regardless of what standard the District Court applied, the Government could not identify one error in Ferrand's testimony.

In reviewing the Court's decision, in its own words, it is abundantly clear that the Court did not understand the issues. The Court for example incorrectly determined that the Bond issue was a refinancing issue as opposed to a Refunding issue (A530). This simple but significant mistake invalidates the Court's conclusion and demonstrates that it either was not listening or failed to appreciate the significant distinction. Additionally, and curiously the Court misstates Ferrand's testimony in concluding that Ferrand calculated a potential loss of $2,723,236.26 (A533). The Court's statement is curious in the sense that neither Egland nor Ferrand ever opined as to a loss of $2,723,236.26. The Court, in its confusion simply made it up. The Court further fails to understand that the $104 million dollar issue provided several benefits. For example it instituted a $25 million dollar investment fund, delayed payments into the future, it consolidated payments to decrease the reliance on costly tax anticipation notes and importantly resulted in a tax savings of $15 million dollars.

This Court must consider whether the District Court understood the finances involved when

ANDREW KALOTAY
ASSOCIATES INC.

October 12, 2000

Joseph Galluzzi
20596-050 / Unit AC
FPC Allenwood
PO Box 1000
Montgomery PA 17752

Dear Mr. Galluzzi:

Enclosed is our report, "An Analysis of the $104,396,083.60 Series 1989 B Bond Refunding by The County of Essex." Recall, you engaged Andrew Kalotay Associates to review the refunding transaction and provide an assessment of the cost/benefit to the County of Essex. As part of that exercise, we were required to review a number of documents, including court testimony, accountants' reports and the reports of the other experts as to the cost/benefit of the refunding transaction.

Our analysis indicates that the refunding transaction provided a benefit to the County in excess of $2.7 million as of the date of the transaction, June 29, 1989. In 1998 dollar terms (the year of the court case involving the transaction), the County benefited by over $5.5 million.

Our report provides a rigorous analysis of the financial consequences of the refunding transaction. We are explicit as to the cash flows involved and the appropriate rates of return required for analysis. Our attention to detail contrasts that of the Prosecution's expert, Mark Egland, in the case *United States v. Galluzzi,* whereby Mr. Egland's cost/benefit analysis offers a final number, but little detail as to how he arrived at his number.

Once you have had a chance to review the report, we would be happy to discuss our analysis with you. We look forward to the next step in the process.

Cordially,

Michael P. Dorigan
Senior Associate

61 Broadway * New York, New York 10006 * (212) 482-0900 * Fax (212) 482-0529
www.kalotay.com

United States v. Galluzzi
An *Analysis* of the $104,396,083.60 Series 1989 B Bond Refunding
By
The County of Essex

In 1989, Essex County, NJ, (County) undertook a debt refunding transaction. In this transaction the County issued general obligation bonds **(GOS)** identified as Series 1989 B, in the amount of $104,396,083.60, which proceeds were used to eliminate various outstanding bonds of the County. The economic value of this transaction to the County has been brought into question in *United States v. Galluzzi,* and addressed in appeal subsequent to the verdict delivered in United States District Court. Our analysis of the transaction indicates that its ***benefit*** to Essex County was 2.735 million in 1989 dollars.[3] This figure is the product of a rigorous cash flow analysis, the result of a detailed review of the offering prospectus, including the Official Statement (OS), and the independent accountant's verification report (Accountant's Report). The evidence presented by the prosecution's expert witness in the original proceeding was based on a flawed approach that resulted in findings by the sentencing judge that were clearly erroneous.

To support our results, we have approached the valuation problem in the following manner:

1. We undertook a full review of the Prospectus and Accountant's Report and identified all cash flows relevant to the case at hand as of June 29, 1989.

2. We applied the proper present value (PV) analysis whereby we established the cost incurred by the County due to the Series 1989 B issue and the offsetting costs eliminated by the defeasance of various outstanding County bonds and the repayment of an advance from the General Fund of the County. (The advance was made to cover certain

[3] The transaction took place in 1989. The trial and sentencing took place in 1998. Care must be taken when discussing the value of the transaction to the County, since the dollar values are given in 1989 dollars in some instances, and 1998 dollars in others.

debt service costs related to the refunded bonds incurred prior to the execution of the transaction.) Critical in our analysis was the use of the proper discount rate, which is the marginal taxable cost of interest to the County.

3. We assessed the testimony of the prosecution's expert witness, Mark Egland. We found through his testimony that he lacked an understanding of the defeasance transaction and the proper valuation of cash flows. We were unable to reproduce Mr. Egland's results, and we are at a loss as to how he obtained these results. They appear to be incompatible with the Accountant's Report. We discuss our critique of his errors with greater specificity below.

In what follows we provide detail as to the sources of our data, the resulting cash flows we used for our valuation, and the application of PV analysis to the cash flows. We are explicit in the description and presentation of the new issue cash flows (Series 1989 B), cash flows for the defeased bonds (referred to below and in the OS as Prior Bonds) and the advance from the County General Fund. We identify the proper discount rate as 8.25%, a number mutually agreed upon by both prosecution and defense witnesses as the taxable rate of interest to the County,[4] and arrive at the net benefit figure mentioned above, $2.735 million.

Cash Flows

Prior to the sale of financial securities, the issuing entity is required to register the issuance with the United States Securities and Exchange Commission (SEC). As part of the process, a new-issue prospectus is created for circulation among interested parties in which the offering is described in intricate detail. In the section headed **Purpose of Issue**,[5] the Prospectus states:

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[4] See paragraph 10 of Certification of Mark Egland, *United States v. Galluzzi*, United States District Court of New Jersey, August 1998. In this paragraph Mr. Egland notes that Mr. Galluzzi had used this same rate in the close-out report of the transaction. Mr. Egland continues "this is one number in Galluzzi's close out report that is consistent with *actual market conditions* between 1989 and 1998 (emphasis added).

[5] See page 1 of New Issue Prospectus, County of Essex, New Jersey. General Obligation Refunding Bonds, Series 1989B, June 7, 1989. Page 1 begins the Official Statement.

> The Bonds are being issued to provide moneys to: (i) deposit cash and purchase non-callable United States Treasury Obligations to be held in an escrow account to pay all of the interest on and principal of certain of the currently outstanding bonds of the County when due (the "Prior Bonds");.. . (ii) pay the cost of a bond insurance premium; and (iii) pay certain costs of issuance incurred in connection with the sale of the Bonds.

Greater detail as to the County's intentions is provided a few pages later in the **OS**. From the section titled **Plan of Financing**[6]:

> The County proposes to advance refund $99,788,500 of outstanding non-callable debt when due with the issuance of Bonds. The financing plan will enable the County to achieve improved cash flow as a result of consolidation of debt service payments payable annually on December 15 of each year and approximately level annual debt service on the Bonds thereby allowing the County more flexibility in planning and meeting its budgetary requirements.

Later in a section titled **Seasonal Borrowing**, the OS states that the design of the issue is meant "to reduce the County's need to undertake seasonal borrowing to cover cash flow deficiencies."[7]

Clearly the County intended to defease a number of outstanding bonds with the proceeds of the sale of the Series 1989 B bonds.[8] This would then allow a restructuring of the debt service with a design to relieve the County of budgetary constraints. **This defeasance process removes the liability for the Prior Bonds from the balance sheet of the County.** A trust is created and funded with the proceeds of the sale of Series 1989

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[6] See page 7 of the OS.

[7] See page 7 of the OS.

[8] At least, we should say, it is clear to anyone whose diligence brought him to read through at least the first seven pages of the OS. It is disturbing to read Mr. Egland's testimony concerning the purpose of the refunding transaction. See testimony in *United States v. Galluzzi*, US District Court of New Jersey, Transcript, April 8. 1998. On cross-examination, Mr. Egland is asked, "Isn't the primary purpose disclosed in all the material that you have in front of you?" Mr. Egland responds, "The primary purpose, no." (page 62, lines 2-4) Further questioning of Mr. Egland fails to elicit an answer to the question concerning the primary purpose of the transaction (See page 62, lines 5-23. page 63, lines 20-25, and page 64, lines 1-15) We are at a loss to explain his response.

B.[9] Therefore, we know that there are two sets of cash flows that we need to create in order to assess the value of the transaction: those *incurred* from the issuance of Series 1989 B and those *eliminated.*

Incurred cash flows are the debt service on the new issue, Series 1989 B. The cover of the prospectus, dated June 7, 1989, provides a list of bonds that were issued in the Series. Exhibit A we provides the cash flows from the Series.[10] As the Exhibit indicates, the bonds are annual-pay bonds, all of which mature on December 15, across various maturities. These numbers are confirmed in the Accountant's Report in the table labeled Series 1989 Refunding Issue Standard Debt Service.

Two sets of cash flows are eliminated in the refunding. The Prior Bonds to be retired are listed on page 3 of the OS, under the heading Prior Bonds. The Accountant's Report provides detail on the outstanding cash flows from each of the 9 issues as of June 29, 1989, in a section titled "Original Debt Service by Issue," in a table labeled Combined Prior Debts Essex 1 Through Essex9. We reproduce that table in Exhibit B.

The second cash flow that the refunding eliminates is the cash advance owed to the General Fund in the amount $6.162 million. Page 2, Note 2 in the Source and Uses section of the OS clearly indicates that this debt accrued as the transaction was structured. Essentially, interest and principal payments were due on May 1, May 15, and June 1, 1989. The monies to cover these payments were advanced from the County General Fund in anticipation of the transaction, after which these monies would be repaid from proceeds. Since the advance represents the current amount due as of June 29, 1989, no adjustment is needed to arrive at a present value. This advance figure is explicit in the Accountant's Report in a table labeled Series 1989 Refunding Issue: Sources and Uses of Funds. Exhibit C provides a summary of the Sources and Uses sections from both the OS and the Accountant's Report.

Having obtained all cash flows, we can now determine the economic impact of the refunding transaction on the County by PV computation.

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[9] For more background on this type of transaction see the Official Statement, page 9, for a description of Refunding Bonds. Also, page 13 of the OS provides the Escrow Deposit Agreement and some notes on Computations.

[10] These cash flows were compiled from data in the OS, and in the report of Samuel Klein and Company (Accountants) to the County of Essex, et al.

Economic Impact

PV analysis is the standard method for determining the economic consequences of a refunding transaction. According to PV analysis, future cash flows are discounted to the present via an appropriate discount rate. The rate selected has a critical impact on the results.

The appropriate rate in assessing the economic impact of refunding transaction is the marginal taxable (unsubsidized) rate of interest to the County. Even though the cash flows in question are tax-exempt to investors, the municipality's taxable rate of interest must be employed as the discount rate. All testifying parties are in agreement that this taxable interest rate is 8.25%. This number is significantly higher than the 6.817% yield on the new tax-exempt issue (referred to as the arbitrage yield in testimony)[11]

The results of the PV analysis are presented in Exhibit D. Listed are each of the bond issues from Series 1989 B (Cost Incurred) and the set of Prior Bonds plus the outstanding advance from the General Fund (Cost Eliminated), and the PV of each set of cash flows. The incurred cost by the County in 1989 amounts to $94.789 million. By incurring this cost, the County was able to achieve savings of $97.524 million by eliminating the Prior Bonds and repaying the General Fund $6.162 million. ***Totaling all the pieces, the refunding provided the County with a net benefit of $2.735 million in 1989 dollars.***

Review of Reports to the Court

Our resulting $2.735 million benefit differs from the loss in Mark Egland's Analysis Group Economics report of December 3, 1997 and his Certification report of August 1998, as well as the present value analysis in the Accountant's Report. We now critique each of these below.

Mr. Egland's Report

We are unable to reproduce the results of a number of Mr. Egland's calculations for the Court, including those in his testimony and Certification to the Court. We are not in possession of any of his working

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[11] See Kalotay, Andrew and Bruce Tuckman, "Subsidized Borrowing and the Discount Rate: The Case of Municipal Capital Budgeting and Financial Management," Municipal Finance Journal, v 19, no. 4, Winter 1999.

papers and have been told that Mr. Egland did not provide any documentation to support his tables and conclusions. There is much confusion as to the cash flows Mr. Egland used in his calculation, discount rate and compounding rate, and date he used as his PV date (We, on the other hand, explicitly list all cash flows, the exact date on which each occurs, discount rate, compounding rate and state that June 29, 1989, is the PV date for our calculations).

We do know this much. In his September 10, 1998, appearance before the Court, Mr. Egland testified "the economic merits of the bond deal were summarized in Mr. Galluzzi's presentation of the deal in the post finding close out report. The base case ... suggests that there was a net increase in taxes to the county of 2.335 million dollars ... (p)resent value as of 1989," indicating an economic loss to the County[12,13] Later in his testimony, Mr. Egland stated that he used the 6.817% arbitrage yield as his discount rate to find the present value as of 1989, the calculation being performed, apparently, as he attempted to "prove out" the Base Case exhibit from Mr. Galluzzi's close-out report.[14]

Further in his testimony, Mr. Egland restated that he simply took the $2.3 million estimated loss and grew it at *8.25%* to 1998 to arrive at his $4.7 million loss, stating that 8.25% is a "reasonable assumption."[15] With this approach Mr. Egland has committed an ***egregious*** error, a violation one of the fundamental principles of finance.

The nature of this error is captured in an old Latin phrase, *Sed pecunia non olet,* literally, "But money has no smell" A better interpretation is, "Money is money." Mr. Egland violates this notion by treating cash flows in his discounting calculation differently from the same cash flows in his

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[12] See *United States v. Galluzzi*, Transcript, September 10, 1998, pages 49-50.

[13] See Close-Out Report on Restructuring County Debt, November 21, 1989, prepared by Joseph Galluzzi, supported with exhibits prepared by First Fidelity Bank, the underwriter.

[14] See *United States v. Galluzzi*, Transcript, September 10, 1998, pages 50-51.

[15] Ibid. See page 50, lines 1-4, and lines 19-20. It must be noted that the reported loss of $4.765 million has no relation to Mr. Egland's AGE report of December 3, 1997, page 1. In that report, Mr. Egland states that the "refunding plan will cost the County approximately $5.8 million on a net present value basis as of 1989." This change begs the questions, Where did he get his numbers? What discount rates was he using? What changed?

compounding calculation as if they were two different types of money. This is not allowed in finance. One ***cannot*** apply two different rates to the same cash flow, one for discounting (6.817%) and another for compounding (8.25%). The proper rate for both the compounding and discounting calculations is 8.25%.

The Accountant's Report

In a table titled "Difference of Refunding VS Refunded Obligations" in the Accountant's Report, the present value of the transaction is calculated to be a cost to the County of $7.945 million. Unfortunately, **the Accountant makes three (3) errors in its calculation.**

First, the Accountant's calculation omits a significant cash flow from the present value analysis. It does account for the cash flows of the refunding bond issues (Series 1989 B), and for those of the refunded bond issues. However, it does not account for the repayment of the $6.162 million advance to the General Fund.[16] Hence, a significant benefit to the County is lost in the calculation, thereby significantly overstating the NPV loss to the County.

Secondly, the cash flows from the Prior Bonds are reported to fall on December 31 of each year, instead of their actual payment dates. This holds for the 1989 Series B bonds as well, though in this latter case it is a difference of only. 16 days from the actual payment date of December 15. By moving the Prior Bond's cash flows to the end of the year, the Accountant lowers the cost of the Prior Bonds, in effect, reduces the benefit of refunding these bonds. (Mr. Egland recognized this error in another report and estimated that the difference in value that was caused by the move to end-of-year cash flows was $3.60 million.[17])

Finally, the calculation in the Accountant's Report employed the arbitrage yield of 6.817% as the discount rate instead of the proper rate of 8.25% discussed above. (The arbitrage yield is the internal rate of return of the Series 1989 B issue, based on the net proceeds to the County.)

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[16] This is a strange error of omission, since the Accountant makes a full accounting of all cash flows, including the repayment of the advance, in the Sources & Uses chart of the transaction. Again, see our Exhibit C.

[17] See *United States v. Galluzzi*, Transcript, Apr 08, 1998, page 38, lines 10-14. We made no attempt to verify the $3.60 million figure suggested by Mr. Egland, choosing to focus on calculating the true cost/benefit to the County.

Using a lower discount rate, i.e., the 6.817% rate, understated the benefit of the refunding to the County.

Additional Comments Concerning Mr. Egland's Testimony

Despite a list of credentials presented to the court, throughout his testimony Mr. Egland made statements indicating a lack of understanding of finance in general, municipal finance in particular, and, specifically, the mechanics of this refunding transaction. Mr. Egland either failed to read, or failed to understand the Official Statement (OS) contained in the offering prospectus and the Accountant's Report by which the accuracy of the cash flow projections were derived. Mr. Egland was unfamiliar with "low-to-high" refundings, which are a fairly common municipal transaction designed to restructure cash flows due on outstanding liabilities. In addition, Mr. Egland apparently had no knowledge of the mechanics of a defeasance, and therefore, continued to make misleading statements throughout his testimony regarding the level of County's debt following the transaction without mentioning the assets purchased in the escrow fund to offset the prior debt. We address this last comment further.

Mr. Egland made the following statement early in his testimony: "The idea was to issue new debt to essentially payoff the old debt issue. But as you can see here, there was no call feature on the old debt. What that means is you can't prepay the old debt."[18]

This statement is factually incorrect. In fact, the magnitude of the error is so great as to bring the entire body of testimony from Mr. Egland into question. Consider that Page 2 of the OS, which provides a detailed explanation of the Sources and Uses, essentially describes the entire refunding transaction. The sources are simply the Bond Proceeds from the sale of the Series 1989 B bonds and the accrued interest that has built up from the "Dated Date" (the date from which accrued interest is calculated, June 15, 1989) to the actual issue date (June 29, 1989).

Uses of funds are listed next. First is the "Deposit in Escrow Fund," the same escrow fund described in the Purpose of Issue statement. There are two notes associated with this deposit. The first describes the amount of State & Local Government Securities (SLGS, or "slugs") that must be

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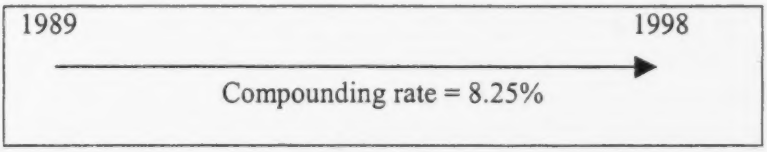
[18] See *United States v. Galluzzi*, Transcript, Apr 08, 1998, page 33, lines 4-25.

purchased to satisfy the cash flow needs of the Prior.Bonds.[19] Once purchased, the SLGS generate cash flows sufficient to satisfy the cash flow requirements of the Prior Bonds. Since the US Treasury issues the SLGS, there is no risk of default. Thus, the Prior Bonds are effectively retired, relieving the County of the obligation to pay forthcoming interest and principal.[20]

Thus, Mr. Egland's testimony that a call feature was necessary in order to pre-pay the Prior Bonds was erroneous.[21] The County effectively pre-paid the old debt. It used the proceeds of the Series 1998B bonds to purchase US Treasury securities in order to eliminate a number of outstanding bonds and additional accrued liabilities.[22] References to "a 75% increase" in the County's debt are incorrect, since the prior debt of the County had been eliminated via the defeasance.[23]

Conclusion

By carefully reviewing the appropriate, and independently assembled documents, we have recreated the financial situation faced by Essex County in June 1989. By applying the appropriate discount rate, we have determined that the net effect to the County was a benefit equivalent to 2.735 million 1989 dollars. Translating this at 8.25% into 1998 dollars (equivalent to those put forth by Mr. Egland in his Certification Report[24]), the transaction resulted in a net benefit to the County of 5.582 million 1998 dollars, i.e.,



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[19] The Bureau of Public Debt offers an introduction to the SLGS program on its website at www.publicdebt.treas.gov/spe/spe.htm.

[20] See the Government's appellate brief, *United States v. Galluzzi*, section C, page 40, referring to the erroneous notion that County "total debt more than doubled."

[21] Ibid. The Government's appellate brief referred to Egland's testimony concerning the call feature.

[22] Again, see the Official Statement, particularly pages 9 & 13.

[23] See *Unites States v. Galluzzi*, Transcript, Apr 08, 1998, page 35, line 6.

[24] See Certification of Mark Egland, page 2. Mr. Egland states that "the calculations must be put into 1998 dollars and when that is done, the loss in 1998 dollars is approximately $4.765.000."

$2.735 million	$5.582 million

Prosecution's expert testimony regarding this benefit is in error. In addition, statements made throughout his testimony are indicative of expert's lack of understanding of the nature and mechanics of this transaction.

Documents Reviewed

Analysis Group Economics, Inc., "United States V. Galluzzi," December 3, 1997.

Certification of Mark Egland, United States District Court of NJ, August 5, 1998.

Ferrand Jordan & Company, "United States of America vs. Joseph P. Galluzzi," September 3, 1998.

Galluzzi, Joseph P., "Close-Out Report on Restructuring of County Debt," County of Essex Department of Administration and Finance, November 21, 1989.

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Samuel Klein and Company, *Verfication of Mathematical Computations,* June 29, 1989.

United States of America v. Joseph P. Galhizzi, United States District Court of NJ, Transcript, April 8, 1998.

United States of America v. Joseph P. Galluzzi, United States District Court of NJ, Transcript, September 8, 1998.

United States of America v. Joseph P Galluzzi, United States District Court of NJ, Transcript, September 10, 1998.

Exhibit A

Cash Flows from Refunding Bonds

Beginning June 29, 1989

Date	Principal	Interest	Total Cashflow
15-Dec-89	$ -	$ 2,789,609	$ 2,789,609
15-Dec-90	$ -	$ 5,579,218	$ 5,579,218
15-Dec-91	$ 4,045,000	$ 5,579,218	$ 9,624,218
15-Dec-92	$ 4,680,000	$ 5,316,292	$ 9,996,292
15-Dec-93	$ 10,485,000	$ 5,009,752	$ 15,494,752
15-Dec-94	$ 11,180,000	$ 4,317,742	$ 15,497,742
15-Dec-95	$ 11,920,000	$ 3,574,272	$ 15,494,272
15-Dec-96	$ 12,720,000	$ 2,775,632	$ 15,495,632
15-Dec-97	$ 13,580,000	$ 1,917,032	$ 15,497,032
15-Dec-98	$ 14,505,000	$ 993,592	$ 15,498,592
15-Dec-99	$ 15,500,000	$ -	$ 15,500,000
15-Dec-00	$ 15,500,000	$ -	$ 15,500,000
15-Dec-01	$ 15,495,000	$ -	$ 15,495,000
Total:	$ 129,610,000	$ 37,852,359	$ 167,462,359

Exhibit B

Cash Flows from Prior Bonds

Beginning June 29, 1989

Date	Principal	Interest	Total Cashflow
15-Jul-89	$ 3,660,000	$ 996,258	$ 4,656,258
01-Oct-89	$ 2,340,000	$ 686,788	$ 3,026,788
01-Nov-89	$	$ 76,798	$ 76,798
15-Nov-89	$	$ 592,410	$ 592,410
01-Dec-89	$ 1,000,000	$ 757,396	$ 1,757,396
15-Jan-90	$	$ 872,958	$ 872,958
01-Apr-90	$	$ 618,050	$ 618,050
01-May-90	$ 650,000	$ 76,798	$ 726,798
15-May-90	$ 1,700,000	$ 592,410	$ 2,292,410
01-Jun-90	$ 2,235,000	$ 733,396	$ 2,968,396
15-Jul-90	$ 3,550,000	$ 872,958	$ 4,422,958
01-Oct-90	$ 2,340,000	$ 618,050	$ 2,958,050
01-Nov-90	$	$ 60,142	$ 60,142
15-Nov-90	$	$ 526,535	$ 526,535
01-Dec-90	$ 1,000,000	$ 665,016	$ 1,665,016
15-Jan-91	$	$ 750,058	$ 750,058
01-Apr-91	$	$ 549,313	$ 549,313
01-May-91	$ 650,000	$ 60,142	$ 710,142
15-May-91	$ 1,700,000	$ 526,535	$ 2,226,535
01-Jun-91	$ 2,225,000	$ 641,016	$ 2,866,016
15-Jul-91	$ 3,435,000	$ 750,058	$ 4,185,058
01-Oct-91	$ 2,340,000	$ 549,313	$ 2,889,312
01-Nov-91	$	$ 43,486	$ 43,486
15-Nov-91	$	$ 460,660	$ 460,660
01-Dec-91	$ 1,000,000	$ 572,966	$ 1,572,966
15-Jan-92	$	$ 628,648	$ 628,648
01-Apr-92	$	$ 480,575	$ 480,575
01-May-92	$ 650,000	$ 43,486	$ 693,486
15-May-92	$ 1,700,000	$ 460,660	$ 2,160,660
01-Jun-92	$ 2,225,000	$ 548,966	$ 2,773,966
15-Jul-92	$ 3,320,000	$ 628,648	$ 3,948,648
01-Oct-92	$ 2,340,000	$ 480,575	$ 2,820,575
01-Nov-92	$	$ 26,829	$ 26,829
15-Nov-92	$	$ 394,785	$ 394,785
01-Dec-92	$ 1,000,000	$ 480,916	$ 1,480,916
15-Jan-93	$	$ 508,958	$ 508,958

Date	Principal	Interest	Total Cashflow
01-Apr-93	$	$ 411,838	$ 411,838
01-May-93	$ 650,000	$ 26,829	$ 676,829
15-May-93	$ 1,700,000	$ 394,785	$ 2,094,785
01-Jun-93	$ 2,225,000	$ 456,916	$ 2,681,916
15-Jul-93	$ 3,210,000	$ 508,958	$ 3,718,958
01-Oct-93	$ 2,340,000	$ 411,838	$ 2,751,838
01-Nov-93	$	$ 10,173	$ 10,173
15-Nov-93	$	$ 328,910	$ 328,910
01-Dec-93	$ 1,000000	$ 388,866	$ 1,388,866
15-Jan-94	$	$ 390,450	$ 390,450
01-Apr-94	$	$ 343,100	$ 343,100
01-May-94	$ 397,000	$ 10,173	$ 407,173
15-May-94	$ 1,700,000	$ 328,910	$ 2,028,910
01-Jun-94	$ 2,177,000	$ 364,866	$ 2,541,866
15-Jul-94	$ 3,105,000	$ 390,450	$ 3,495,450
01-Oct-94	$ 2,340,000	$ 343,100	$ 2,683,100
15-Nov-94	$	$ 263,035	$ 263,035
01-Dec-94	$ 1,000,000	$ 298,160	$ 1,298,160
15-Jan-95	$	$ 273,202	$ 273,202
01-Apr-95	$	$ 274,363	$ 274,363
15-May-95	$ 1,700,000	$ 263,035	$ 1,963,035
01-Jun-95	$ 1,150,000	$ 274,160	$ 1,424,160
15-Jul-95	$ 2,885,000	$ 273,202	$ 3,158,202
01-Oct-95	$ 2,340,000	$ 274,363	$ 2,614,362
15-Nov-95	$	$ 197,160	$ 197,160
01-Dec-95	$ 1,000,000	$ 236,210	$ 1,236,210
15-Jan-96	$	$ 162,660	$ 162,660
01-Apr-96	$	$ 205,625	$ 205,625
15-May-96	$ 1,700,000	$ 197,160	$ 1,897,160
01-Jun-96	$ 1,150,000	$ 212,210	$ 1,362,210
15-Jul-96	$ 2,640,000	$ 162,660	$ 2,802,660
01-Oct-96	$ 2,335,000	$ 205,625	$ 2,540,625
15-Nov-96	$	$ 131,285	$ 131,285
01-Dec-96	$ 975,000	$ 174,260	$ 1,149,260
15-Jan-97	$	$ 60,300	$ 60,300
01-Apr-97	$	$ 137,034	$ 137,034
15-May-97	$ 1,700,000	$ 131,285	$ 1,831,285
01-Jun-97	$ 1,150,000	$ 150,860	$ 1,300,860
15-Jul-97	$ 900,000	$ 60,300	$ 960,300
01-Oct-97	$ 2,335,000	$ 137,034	$ 2,472,034
15-Nov-97	$	$ 65,410	$ 65,410
01-Dec-97	$	$ 112,910	$ 112,910

Date	Principal	Interest	Total Cashflow
15-Jan-98	$	$ 30,150	$ 30,150
01-Apr-98	$	$ 68,444	$ 68,444
15-May-98	$ 1,688,000	$ 65,410	$ 1,753,410
01-Jun-98	$ 1,150,000	$ 112,910	$ 1,262,910
15-Jul-98	$ 900,000	$ 30,150	$ 930,150
01-Oct-98	$ 2,330,000	$ 68,444	$ 2,398,444
01-Dec-98	$	$ 74,959	$ 74,959
01-Jun-99	$ 1,150,000	$ 74,959	$ 1,224,960
01-Dec-99	$	$ 37,009	$ 37,009
01-Jun-00	$ 1,121,500	$ 37,009	$ 1,158,510
Total:	$ 95,203,500	$ 28,975,570	$ 124,179,170

Exhibit C
Sources & Uses of Funds
Source: Official Statement

Sources	
Bond Proceeds	$ 104,396,083.60
Accrued Interest	$ 216,969.57
Total Sources	$ 104,613,053.17
Uses	
Deposit in Escrow Fund (1)(2)	$ 102,139,241.37
Accrued Interest Paid to County	$ 216,969.57
Cost of issuance	$ 2,256,842.23
Total Uses -	$ 104,613053.17

(1) Excluded for this Exhibit
(2) $6,162,498.38 paid on the Prior Bonds by the County on 5/1/89, 5/15/89, 6/1/89 will be repaid to the County from bond proceeds as the Bonds are scheduled for settlement subsequent to these dates.

Source: Accountant's Verification Report (Samuel Klein & Company)

Sources of Funds	
Par Amount, Refunding Issue	$ 129,610,000.00
Less: Original Issue Discount	$ (25,213,916.40)
	$ 104,396,083.60
Accrued Interest	$ 216,969.57
Total Sources of Funds	$ 104,613,053.17
Uses of Funds	
Escrow Investments	$ 95,976,742.99
Deposit to General Purpose,Fund	$ 6,162,498.38
Deposit to Debt Service Fund	$ 216,969.57
Underwriter's Discount	$ 1,539,842.23
Insurance	$ 486,000.00
Issuance Expense	$ 231,000.00
Total Uses of Funds	$ 104,613,053.17

Exhibit D

Cost/Benefit Analysis

Valuations as of June 29, 1989

Cost Incurred from Refunding Issue				Cost Eliminated by Refunding Issue				Total
Bond	Face Outstanding (Millions) (A)	Computed PV (% of Face) (B)	PV (Millions) (C = A x B)	Bond	Face Outstanding (Millions) (D)	Computed PV (% of Face) (E)	PV (Millions) (F = D x E)	Net Benefit to Essex (Millions) (G = C + F)
Additional Proceeds	$ 0.217	100.000	$ 0.217	Repay Advance	$ 6.162	100.000	$ 6.162	
Accrued Interest	$(0.217)	100.000	$ (0.217)	Accrued Interest	$ 1.531	100.000	$ 1.531	
6.500's due 1991	$ (4.045)	95.936	$ (3.881)	6.750's due 1989	$ 2.760	99.929	$ 2.758	
6550's due 1992	$ (4.680)	94.632	$ (4.429)	7 000's due 1990	$ 2.650	98.764	$ 2.617	
6.600's due 1993	$ (10.485)	93.509	$ (9.804)	7 200's due 1991	$ 2.535	98.051	$ 2.486	
6.650's due 1994	$ (11.180)	92.551	$ (10.347)	7.400's due 1992	$ 2.420	97.745	$ 2.365	
6.700's due 1995	$ (11.920)	91.743	$ (10.936)	7.650's due 1993	$ 2.310	97.964	$ 2.263	
6.750's due 1996	$ (12.720)	91.071	$ (11.584)	5.125's due 1994	$ 2.997	92.804	$ 2.781	
6.800's due l997	$ (13.580)	90.523	$ (12.293)	5.600's due 1994	$ 5.327	93.430	$ 4.977	
6.850's due 1998	$ (14.505)	90.086	$ (13.067)	7.900's due 1994	$ 2.205	98.572	$ 2.174	
0.000's due 1999	$ (15.500)	42.925	$ (6.653)	8.100's due 1995	$ 1.985	99.289	$ 1.971	
0 000's due 2000	$ (15.500)	39.591	$ (6.137)	4.800's due l995	$ 0.700	90.300	$ 0.632	
0.000's due 2001	$ (15.495)	36.516	$ (5.658)	8.300's due 1996	$ 1.740	100.255	$ 1.744	
Total	$ (129.610)		$(94.789)	4.800's due 1996	$ 7.275	89.070	$ 6.480	
				7.750's due 1998	$ 15.288	98.095	$ 14.907	
				6.700'sdue 1998	$ 9.000	94.570	$ 8.511	
				5.875's due 1998	$ 23.380	91.328	$ 21.352	
				6.600's due 2000	$ 12.632	92.802	$ 11.722	
				Total	$ 95.204		$ 97.524	$ 2.735

* All present values are calculated using an 8.25% annual rate, representative of Essex County's marginal taxable rate of interest at the time of the transaction.

Represents repayment of an advance of funds from the County General Fund.

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Andrew Kalotay, Ph.D., is a pioneer and leading authority on the practice. of liability management and a noted expert on the valuation and analysis of corporate and municipal bonds. He is a prolific contributor to the literature on fixed income topics such as bond refunding, interest rate derivatives, and the valuation of bonds with embedded options.

Dr. Kalotay is the originator of such innovations as the recently-introduced S&P Credit Index and the Ratchet Bond. He is also known for inventing the concept of refunding efficiency—a widely used tool in the management of callable debt.

PROFESSIONAL EXPERIENCE

1990-Present	*Andrew Kalotay Associates, Inc.* President
1994-1997	*Polytechnic University* Director: Center for Finance and Technology
1981-1990	*Salomon Brothers Inc.* Director-Research, Group Manager: Bond Portfolio Analysis Department
1978-1981	*Dillon Read & Co, Inc.* Senior Analyst: Research
1972-1978	*AT&T* Supervisor: Corporate Planning, Financial Planning
1968-1972	*Bell Telephone Laboratories* Member of Technical Staff Operations Research, Systems Engineering.

ACADEMIC EXPERIENCE

Polytechnic University Professor of management (1994-1997)
Fordhan, University, Professor of finance (1990-1994)
Columbia, Adjunct professor of finance (1987)
Wharton, Adjunct professor of finance (1979)
Numerous publications in finance, operations research, and statistics.
Associate editor and frequent referee for several journals.

EDUCATION

University of Toronto, Ph.D. Mathematics. Thesis in Statistical Inference (1968).
Queen University, M. Sc., Mathematics. Thesis in Algebraic Coding Theory (1966).
Queen University, B. Sc. (Honors), Mathematics (1964).

OTHER

Fixed Income Hail of Fame, inductee
Fixed Income Analysts Society of New York, President, 1988 to 1989
Financial Management Assoc., Trustee, 1989 to 1994
American Finance Assoc., American Statistical Assoc., Financial Management Assoc.,
Member
Chess master, renowned chess problemist

SELECTED PUBLICATIONS

Municipal Finance

Subsidized Borrowing and The Discount Rate: The Case of Municipal Capital Budgeting and Financial — Management Municipal Finance Journal (Winter 1999)*
The Timing of Advanced Refunding of Tax-Exempt Municipal Bonds — Municipal Finance Journal (Summer 1998)*
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A Model For Valuing Bonds And Embedded Options — *Financial Analysts Journal* (May/June 1993)*
Managing the Capital Structure — *The Handbook of Modern Finance,* (Warren, Gorham & Lamont, Inc., 1989)*
An Analysis Of Original Issue Discount Bonds —*Financial Management* (Autumn 1984)

** Co—authored*

SELECTED EXPERT WITNESS ENGAGEMENTS

Irvine Water District vs. Merrill Lynch re: Orange County (1998). Witness for Merrill Lynch

Bondholders vs. Hennepin County (1996) re: Calling of not-yet-refundable bond. Witness for bondholders.

Commonwealth of Pennsylvania (1996) vs. Prudential Securities, Inc. re: Yield burning. Witness for Prudential

Savings & Loan vs. U.S. Government (1996) re: FIRREA. Witness for U.S. Government

Commonwealth of Massachusetts (1995) vs. Goldman, Sachs & co. re: Yield burning. Witness for municipality

Massachusetts Water Resources Authority (1994) vs. Merrill Lynch, et al. re: Yield burning. Witness for municipality